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II. CRIMINAL PROCEEDINGS

A. Introduction

1. Findings of Fact and Conclusions of Law

The district court's findings of fact are reviewed for clear error. *See e.g.*, *United States v. Rodgers*, 656 F.3d 1023, 1026 (9th Cir. 2011) (motion to suppress); *United States v. Stoterau*, 524 F.3d 988, 997 (9th Cir. 2008) (sentencing); *United States v. Doe*, 136 F.3d 631, 636 (9th Cir. 1998) (bench trial).[1] Findings of fact based on stipulations are entitled to the same deference as those based on in-court testimony. *See United States v. Bazuaye*, 240 F.3d 861, 864 (9th Cir. 2001).

The district court's legal conclusions are reviewed de novo. *See United States v. Forrester*, 512 F.3d 500, 506 (9th Cir. 2008) (motion to suppress).[2] Thus, the district court's construction or interpretation of a statute is reviewed de novo. *See e.g.*, *United States v. Rivera*, 527 F.3d 891, 908 (9th Cir. 2008) (interpreting the Sentencing Guidelines); *United States v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc) (definition of importation).[3] Likewise, the "district court's interpretation of the sentencing

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[1] *See, e.g.*, *United States v. Lam*, 251 F.3d 852, 855 (9th Cir.) (speedy trial), *amended by* 262 F.3d 1033 (9th Cir. 2001) (order); *United States v. Benboe*, 157 F.3d 1181, 1183 (9th Cir. 1998) (possession of firearm); *United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997) (exculpatory evidence).

[2] *See, e.g.*, *United States v. Enas*, 255 F.3d 662, 665 (9th Cir. 2001) (en banc) (double jeopardy); *United States v. Silva*, 247 F.3d 1051, 1054 (9th Cir. 2000) (standing); *United States v. Olafson*, 213 F.3d 435, 439 (9th Cir. 2000) (reasonable suspicion); *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999) (joinder); *United States v. Lester*, 85 F.3d 1409, 1410 (9th Cir. 1996) (criminal forfeiture).

[3] *See United States v. Taylor*, 322 F.3d 1209, 1211 (9th Cir. 2003) (accessory after the fact statute); *United States v. Carranza*, 289 F.3d 634, 642 (9th Cir. 2002) (importation statute); *United States v. Lincoln*, 277 F.3d 1112, 1113 (9th Cir. 2002) (MVRA).

guidelines" is reviewed de novo. *See* *United States v. McEnry*, 659 F.3d 893, 896 (9th Cir. 2011).[4]

The district court's interpretation of the federal rules is reviewed de novo. *See, e.g.*, *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011) (evidence); *United States v. Alvarez-Moreno*, 657 F.3d 896, 900 n.2 (9th Cir. 2011) (criminal procedure); *United States v. W.R. Grace*, 504 F.3d 745, 758-59 (9th Cir. 2007) (evidence); *United States v. Fort*, 472 F.3d 1106, 1109 (9th Cir. 2007) (criminal procedure).

When a district court does not make specific findings of fact or conclusions of law, the court of appeals may nevertheless uphold the result if there is a reasonable view of the evidence to support it. *See* *United States v. Most*, 789 F.2d 1411, 1417 (9th Cir. 1986) (waiver). Failure to make the required findings of fact pursuant to Fed. R. Crim. P. 32(i)(3)(B), however, requires a remand. *See* *Stoterau*, 524 F.3d at 1011.

2. Harmless Error

An error by a district court may be harmless. *See* *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (discussing when harmless error rule applies); *Gautt v. Lewis*, 489 F.3d 993, 1014-1016 (2007). Constitutional error is harmless only when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 23-24 (1967); *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002). "Review for harmless error requires not only an evaluation of the remaining incriminating evidence in the record, but also the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact." *United States v. Bishop*, 264 F.3d 919, 927 (9th Cir. 2001) (quoting *United States v. Harrison*, 34 F.3d 886, 892 (9th Cir. 1994)); *United States v. Oaxaca*, 233 F.3d 1154, 1158 (9th Cir. 2000) (noting "the harmlessness of an error is distinct from evaluating whether there is substantial evidence to support a verdict").

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[4] Note "[t]here is 'an intracircuit conflict as to whether the standard of review for *application* of the Guidelines to the facts is de novo or only for abuse of discretion,'" *United States v. McEnry*, 659 F.3d 893, 896 n.5 (9th Cir. 2011) (quoting *United States v. Laurienti*, 611 F.3d 530, 552 (9th Cir. 2010) (emphasis added)).

A non-constitutional error requires reversal unless there is a "fair assurance" of harmlessness, or stated another way, unless "it is more probable than not that the error did not materially affect the verdict." *See* *United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002);*United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc); *United States v. Hitt*, 981 F.2d 422, 425 (9th Cir. 1992) (describing possible conflict between "fair assurance" and "more probable than not" standards); *see also* *United States v. Kloehn*, 620 F.3d 1122, 1130 (9th Cir. 2010).[5]

In habeas review, the harmlessness standard is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 766 (1946)); *see also* *Ybarra v. McDaniel*, 656 F.3d 984, 995 (9th Cir. 2011); *O'Neal v. McAninch*, 513 U.S. 432, 440-41 (1995) ("if the harmlessness of the error is in 'grave doubt,' relief must be granted"); *California v. Roy*, 519 U.S. 2, 4 (1996) (per curiam) (rejecting Ninth Circuit's "modification" of the *Brecht* standard); *Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir. 2000) (applying *Brecht* to habeas cases under § 2254); *United States v. Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir.) (applying *Brecht* to habeas cases under § 2255).[6]

3. Plain Error

When a defendant raises an issue on appeal that was not raised before the district court, the court of appeals may review only for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 730-36 (1993) (defining limitations on a reviewing court's authority to correct plain error); *see also* *United States v. Pelisamen*, 641 F.3d 399, 404 (9th Cir. 2011).

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[5] *Arnold v. Runnels*, 421 F.3d 859, 867 (9th Cir. 2005) (explaining standard); *United States v. Mett*, 178 F.3d 1058, 1066 (9th Cir. 1999); *United States v. Crosby*, 75 F.3d 1343, 1349 (9th Cir. 1996) (explaining standard); *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997) (finding harmlessness under either "fair assurance" or "more probably than not" standard).

[6] *See, e.g.*, *Evanchyk v. Stewart*, 340 F.3d 933, 941 n. 3 (9th Cir. 2003) (noting this circuit "has not always used the same language in describing the harmless error standard in habeas cases"); *Gill v. Ayers*, 342 F.3d 911, 921 (9th Cir. 2003) (applying *Brecht*); *Padilla v. Terhune*, 309 F.3d 614, 621 (9th Cir. 2002) (same).

Under the plain error standard, relief is not warranted unless there has been: (1) error, (2) that was plain, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See* *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 428 (9th Cir. 2011); *Pelisamen*, 641 F.3d at 404; *United States v. Davenport*, 519 F.3d 940, 943 (9th Cir. 2008);[7] *see also* *United States v. Perez*, 116 F.3d 840, 845-846 (9th Cir. 1997) (en banc) (discussing difference between forfeited rights, which are reviewable for plain error, and waived rights, which are not). Plain error is invoked to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process. *See* *Olano*, 507 U.S. at 736.

4. Structural Error

When an error is constitutional in nature and implicates a "structural" right so basic to a fair trial that, by definition, it can never be harmless, the error is deemed harmful per se. In these instances, the error is not subject to harmless error analysis and requires automatic reversal. *See* *Chapman v. California*, 386 U.S. 18, 23-24 & n.8 (1967); *see also* *United States v. Recuenco*, 548 U.S. 212, 219 (2006); *Neder v. United States*, 527 U.S. 1, 7 (1999) (defining structural error); *Greenway v. Schriro*, 653 F.3d 790, 805 (9th Cir. 2011); *United States v. Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (listing structural errors); *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002) (same). Structural errors "are relatively rare, and consist of serious violations that taint the entire trial process, thereby rendering appellate review of the magnitude of the harm suffered by the defendant

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[7] *See, e.g.*, *United States v. Garcia*, 522 F.3d 855, 860 (9th Cir. 2008) (supervised release conditions); *United States v. Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007) (vouching); *United States v. Delgado*, 357 F.3d 1061, 1065 (9th Cir. 2004) (jury instructions); *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003) (restitution order); *United States v. Luna-Orozco*, 321 F.3d 857, 860 (9th Cir. 2003) (plea deficiency); *United States v. Buckland*, 289 F.3d 558, 568-69 (9th Cir. 2002) (en banc) (*Apprendi* claim); *United States v. Godinez-Rabadan*, 289 F.3d 630, 632 (9th Cir. 2002) (sufficiency of indictment); *United States v. Antonakeas*, 255 F.3d 714, 727 (9th Cir. 2001) (sentencing); *United States v. Romero-Avila*, 210 F.3d 1017, 1021-22 (9th Cir. 2000) (prosecutor's statements).

virtually impossible." *Eslaminia v. White*, 136 F.3d 1234, 1237 n.1 (9th Cir. 1998) (giving examples).

B. Pretrial Decisions in Criminal Cases

1. Appointment of Expert Witness

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. *See United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996); *see also United States v. Reed*, 575 F.3d 900, 918 (9th Cir. 2009). A district court's decision whether to appoint an expert witness at court expense pursuant to Fed. R. Crim. P. 17(b) is reviewed for an abuse of discretion. *See United States v. Cruz*, 783 F.2d 1470, 1473-74 (9th Cir. 1986). A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion that is reviewed for an abuse of discretion. *See United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000).

The district court's decision whether to admit or exclude expert testimony is also reviewed for an abuse of discretion. *See United States v. Sepulveda-Barraza*, 645 F.3d 1066, 1071 (9th Cir. 2011); *Reed*, 575 F.3d at 918; *United States v. Freeman*, 498 F.3d 893, 900-01 (9th Cir. 2007); *United States v. Decoud*, 456 F.3d 996, 1013 (9th Cir. 2006); *United States v. Seschillie*, 310 F.3d 1208, 1211-12 (9th Cir. 2002); *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) (noting admission of expert testimony is reviewed for an abuse of discretion "except where no objection is raised, in which case we review for plain error"); *see also United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011) (explaining that the district court has ample discretion to prevent designation of a new expert witness after trial has started).

2. Bail

Factual findings underlying a district court's pretrial detention order are reviewed under a deferential, "clearly erroneous" standard. *See United States v. Fidler*, 419 F.3d 1026, 1029 (9th Cir. 2005); *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). The court's finding of potential danger to the community is entitled to deference. *See Fidler*, 419 F.3d at 1029; *Marino v. Vasquez*, 812 F.2d 499, 509 (9th Cir. 1987). The district court's interpretation of "community," as used in the Bail Reform

Act is reviewed de novo. *See* *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008). Also, whether the district court's factual findings justify pretrial detention is reviewed de novo. *See* *id.* at 1086-87. The court's finding that a defendant is a flight risk is reviewed under the clearly erroneous standard. *See* *Fidler*, 419 F.3d at 1029; *United States v. Donaghe*, 924 F.2d 940, 945 (9th Cir. 1991). The ultimate "fleeing from justice" question, however, is reviewed de novo, because "legal concepts that require us to exercise judgment dominate the mix of fact and law." *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994); *see also* *Man-Seok Choe v. Torres*, 525 F.3d 733, 741 (9th Cir. 2008). A conclusion based on factual findings in a bail hearing presents a mixed question of fact and law. The facts, findings, and record are reviewed de novo to determine whether the detention order is consistent with constitutional and statutory rights. *See* *Hir*, 517 F.3d at 1086-87; *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990).

A district court's decision to set aside or remit forfeiture of appearance bond is reviewed for an abuse of discretion. *See* *United States v. Nguyen*, 279 F.3d 1112, 1115 (9th Cir. 2002); *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 602 (9th Cir. 1995).

The district court's decision whether to exonerate bail bond sureties is reviewed de novo. *See* *United States v. Noriega-Sarabia*, 116 F.3d 417, 419 (9th Cir. 1997); *United States v. Toro*, 981 F.2d 1045, 1047 (9th Cir. 1992). The legal validity of the bond is also reviewed de novo. *Noriega-Sarabia*, 116 F.3d at 419.

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 44. Pretrial Detention and Release.

3. Bill of Particulars

The district court's decision to deny a motion for a bill of particulars is reviewed for an abuse of discretion. *See* *United States v. Robertson*, 15 F.3d 862, 874 (9th Cir. 1994), *rev'd on other grounds*, 514 U.S. 669 (1995); *United States v. Ayers*, 924 F.2d 1468, 1483 (9th Cir. 1991). The scope and specificity of a bill of particulars rest within the sound discretion of the trial court. *See* *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983).

4. *Brady* Violations

Challenges to convictions based on alleged *Brady* violations are reviewed de novo. *See* *United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004); *United States v. Smith*, 282 F.3d 758, 770 (9th Cir. 2002). A district court's denial of a motion for mistrial or new trial based on an alleged *Brady* violation is also reviewed de novo. *See* *United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000). The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed, however, for an abuse of discretion. *See* *United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992).

A district court's ruling on the prosecutor's duty to produce evidence under *Brady* is reviewed de novo. *See* *United States v. Si*, 343 F.3d 1116, 1122 (9th Cir. 2003); *United States v. Monroe*, 943 F.2d 1007, 1012 (9th Cir. 1991). The court's decision to allow production of redacted documents is reviewed for clear error. *See* *Si*, 343 F.3d at 1122. Thus, the district court's ruling on whether a defendant should have access to particular information in a government document that has been produced pursuant to *Brady* is reviewed for clear error. *See* *Monroe*, 943 F.2d at 1012; *see also* *United States v. Stinson*, 647 F.3d 1196, 1208 (9th Cir. 2011).

Whether a defendant has waived *Brady* rights in a plea agreement is a question of law reviewed de novo. *See* *United States v. Ruiz*, 241 F.3d 1157, 1163 (9th Cir. 2001), *rev'd on other grounds*, 536 U.S. 622 (2002).

5. Competency to Stand Trial

A district court's determination that a defendant is competent to stand trial is reviewed for clear error. *See* *United States v. Loughner*, 672 F.3d 731, 766 n.17 (9th Cir. 2012); *United States v. Johnson*, 610 F.3d 1138, 1145 (9th Cir. 2010); *United States v. Friedman*, 366 F.3d 975, 980 (9th Cir. 2004); *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1171 (9th Cir. 2002); *see also* *Blair v. Martel*, 645 F.3d 1151, 1154 n.1 (9th Cir. 2011) (habeas). The test for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and a rational as well as factual understanding of the proceedings against him." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *see also* *Nash v. Ryan*, 581 F.3d 1048, 1057 (9th Cir.

2009) (order). In a federal habeas proceeding, state court determinations of mental competency are given a presumption of correctness, and will be overturned only if they are not fairly supported by the record. *See King v. Brown*, 8 F.3d 1403, 1408 (9th Cir. 1993).

A court's decision to order a psychiatric or psychological examination is reviewed for an abuse of discretion. *See United States v. George*, 85 F.3d 1433, 1347 (9th Cir. 1996). The court's decision whether to release a copy of the competency report to the media is also reviewed for an abuse of discretion. *See United States v. Kaczynski*, 154 F.3d 930, 931 (9th Cir. 1998). Whether a court is permitted under 18 U.S.C. § 4243(f) to order a psychiatric evaluation of an insanity acquittee is a question of statutory construction reviewed de novo. *See United States v. Phelps*, 955 F.2d 1258, 1264 (9th Cir. 1992).

6. Confessions

This court reviews de novo the voluntariness of a confession. *See United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc); *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003).[8] The district court's factual findings underlying its determination of voluntariness are reviewed for clear error. *See United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009); *Haswood*, 350 F.3d at 1027; *United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002). Special deference is owed to the trial court's credibility determinations. *See United States v. Nelson*, 137 F.3d 1094, 1110 (9th Cir. 1998); *see also United States v. Ruehle*, 583 F.3d 600, 606-07 (9th Cir. 2009).

7. Confidential Informants

The decision whether to disclose the identity of a confidential informant is reviewed for an abuse of discretion. *See United States v. Rowland*, 464 F.3d 899, 903 (9th Cir. 2006); *United States v. Decoud*, 456 F.3d 996, 1009 (9th Cir. 2006); *United States v. Henderson*, 241 F.3d 638, 646 (9th Cir. 2000). The district court must balance the public interest in "protecting the flow of information" against the defendant's competing

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[8] *See also United States v. Shi*, 525 F.3d 709, 730 (9th Cir. 2008); *United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002) (due process test considers totality of circumstances); *Pollard v. Galaza*, 290 F.3d 1030, 1032 (9th Cir. 2002) (habeas).

interest for "relevant and helpful testimony." *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1505 (9th Cir. 1997), *overruled in part on other grounds by Watson v. United States*, 552 U.S. 74 (2007). Nondisclosure is an abuse of discretion only if "disclosure of an informer's identity . . . is relevant and helpful to the defense of the accused, or is essential to a fair determination of [the defendant's] cause." *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

The decision whether to hold an in camera hearing regarding disclosure of the informant's identity is reviewed for an abuse of discretion. *See Henderson*, 241 F.3d at 646; *United States v. Amador-Galvan*, 9 F.3d 1414, 1417 (1993).

The district court's refusal to give an informant credibility jury instruction is also reviewed for an abuse of discretion. *See United States v. Holmes*, 229 F.3d 782, 786 (9th Cir. 2000).

8. Consolidation of Counts

The trial court's decision whether to consolidate counts is reviewed de novo. *See United States v. Douglass*, 780 F.2d 1472, 1477 (9th Cir. 1986) (rejecting abuse of discretion standard). The district court's order that two indictments be tried together is reviewed, however, for an abuse of discretion. *See United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996).

9. Continuances

A district court's decision to grant or deny a motion for a continuance is reviewed for an abuse of discretion. *See United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011); *United States v. Kloehn*, 620 F.3d 1122, 1126-27 (9th Cir. 2010); *United States v. Nguyen*, 262 F.3d 998, 1002 (9th Cir. 2001) (listing factors for appellate court to consider); *United States v. Garrett*, 179 F.3d 1143, 1144-45 (9th Cir. 1999) (en banc) (reaffirming that abuse of discretion is proper standard of review to review "a district court's ruling granting or denying a motion for a continuance"). "To reverse a trial court's denial of a continuance, an appellant must show that the denial prejudiced [the] defense." *United States v. Gonzalez-Rincon*, 36 F.3d 859, 865 (9th Cir. 1994); *see also Wilkes*, 662 F.3d at 543. "Reversal is merited "if 'after carefully evaluating all relevant factors,' [the court] conclude[s] that 'the denial was arbitrary or unreasonable.'" *United States v. Rivera-Guerrero*,

426 F.3d 1130, 1138 (9th Cir. 2005) (quoting *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985)); *see also* *Wilkes*, 662 F.3d at 543. The court considers four factors: the extent of the appellant's diligence in readying his or her defense prior to the set hearing date, the likelihood that the need for the continuance could have been met had the district court granted the continuance, the inconvenience potentially caused by granting the continuance, and the extent of the harm the appellant might have suffered as a result of the denial. *See* *Kloehn*, 620 F.3d at 1127 (citing *Flynt*, 756 F.2d at 1359-61); *Rivera-Guerrero*, 426 F.3d at 1138-39 (citing *Flynt*, 756 F.2d at 1359).

A trial court's refusal to grant a continuance of a sentencing hearing is also reviewed for an abuse of discretion. *See* *United States v. Lewis*, 991 F.2d 524, 528 (9th Cir. 1993); *United States v. Monaco*, 852 F.2d 1143, 1150 (9th Cir. 1988).

10. Defenses

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. *See* *United States v. Ibarra-Pino*, 657 F.3d 1000, 1003 (9th Cir. 2011); *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008) (duress); *United States v. Biggs*, 441 F.3d 1069, 1070 n.1 (9th Cir. 2006); *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (entrapment defense); *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000) (granting motion in limine to preclude presentation of a defense).[9] Thus, the district court's failure to instruct on an appropriate defense theory is a question of law reviewed de novo. *See* *United States v. Crandall*, 525 F.3d 907, 911 (9th Cir. 2008); *United States v. Sayakhom*, 186 F.3d 928, 939-40 (9th Cir.), *amended by* 197 F.3d 959 (9th Cir. 1999); *United States v. McGeshick*, 41 F.3d 419, 421 (9th Cir. 1994). Whether the court's instructions adequately cover the defendant's proffered defense is also reviewed de novo. *See* *United States v. Pierre*, 254 F.3d 872, 875 (9th Cir. 2001) (lesser-included-offense). Whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed,

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[9] *See* *United States v. Shryock*, 342 F.3d 948, 987 (9th Cir. 2003) (accomplice-corroboration/duress); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001) (necessity); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) (entrapment by estoppel).

however, for an abuse of discretion. *See* *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011); *United States v. Bush*, 626 F.3d 527, 539 (9th Cir. 2010); *United States v. Daane*, 475 F.3d 1114, 1119 (9th Cir. 2007); *United States v. Bello-Bahena*, 411 F.3d 1083, 1090 (9th Cir. 2005); *see also* *United States v. Perdomo-Espana*, 522 F.3d 983, 986 (9th Cir. 2008) (explaining various standards of review depending on focus of inquiry). Whether a challenged jury instruction precludes an adequate presentation of the defense theory of the case is reviewed de novo. *See* *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998). Finally, a determination that a defendant has the burden of proving a defense is reviewed de novo. *See* *United States v. Beasley*, 346 F.3d 930, 933 (9th Cir. 2003); *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998); *see also* *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 721 (9th Cir. 2011).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 42. Preclusion of Proffered Defense.

11. Discovery

A district court's discovery rulings are reviewed for an abuse of discretion. *See* *United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1069 (9th Cir. 2003) (denying discovery on claim that prosecution violated equal protection). An order limiting the scope of discovery is reviewed for an abuse of discretion. *See* *United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996); *United States v. Gomez-Lopez*, 62 F.3d 304, 306-07 (9th Cir. 1995).

"To reverse a conviction for a discovery violation, we must find not only that the district court abused its discretion, but that the error resulted in prejudice to substantial rights." *United States v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997) (internal quotations and citation omitted). "To justify reversal of a sanction for a discovery violation, the defendant must show a likelihood that the verdict would have been different had the government complied with the discovery rules." *United States v. de* *Cruz*, 82 F.3d 856, 866 (9th Cir. 1996) (internal quotations and citation omitted).

The district court's discovery rulings under Fed. R. Crim. P. 16 are reviewed for an abuse of discretion. *See* *United States v. Danielson*, 325 F.3d 1054, 1074 (9th Cir. 2003); *United States v. Mandel*, 914 F.2d 1215,

1219 (9th Cir. 1990). The district court's interpretation of Rule 16, however, is reviewed de novo. *See* *Mandel*, 914 F.2d at 1219 (9th Cir. 1990); *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002). The scope of the district court's authority under Rule 16 is also reviewed de novo. *See* *United States v. Gonzalez-Rincon*, 36 F.3d 859, 864 (9th Cir. 1994); *but see* *United States v. Chon*, 210 F.3d 990, 994 (9th Cir. 2000) (discussing scope of Rule 16(a)(1)(c) but applying abuse of discretion standard). The court's conclusion on Rule 16 "materiality" is reviewed, however, for an abuse of discretion. *See* *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995). The propriety of excluding evidence as a sanction under Rule 16 is reviewed for an abuse of discretion. *See* *Finley*, 301 F.3d at 1007.

a. Depositions

Denial of a motion to depose a witness pursuant to Fed. R. Crim. P. 15 is reviewed for abuse of discretion. *See* *United States v. Matus-Zayas*, 655 F.3d 1092, 1098 (9th Cir. 2011); *United States v. Olafson*, 213 F.3d 435, 442-43 (9th Cir. 2000); *United States v. Omene*, 143 F.3d 1167, 1170 (9th Cir. 1998).

b. Jencks Act

A district court's denial of a discovery motion made pursuant to the Jencks Act is reviewed for an abuse of discretion. *See* *United States v. Alvarez*, 358 F.3d 1194, 1210 (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Guagliardo*, 278 F.3d 868, 871 (9th Cir. 2002).

The district court's decision regarding the imposition of sanctions for a Jencks Act violation is reviewed for an abuse of discretion. *See* *United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1031 (9th Cir. 2009); *United States v. McKoy*, 78 F.3d 446, 449 (9th Cir. 1996). A conviction will be affirmed if the "Jencks error is more than likely harmless." *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1457 (9th Cir. 1992); *United States v. Span*, 970 F.2d 573, 582 (9th Cir. 1992); *see also* *Cardenas-Mendoza*, 579 F.3d at 1031("an erroneous decision not to impose sanctions under the Jencks Act [is reviewed] for harmless error"); *Alvarez*, 86 F.3d at 907 (harmless error doctrine applies to Jencks Act violations).

c. Sanctions

Discovery sanctions are generally reviewed for an abuse of discretion. *See* *United States v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir. 2000); *United States v. Scholl*, 166 F.3d 964, 972 (9th Cir. 1999). Whether the district court had any legal basis for its discovery order is reviewed de novo, but if it did, then the court's imposition of sanctions is reviewed for an abuse of discretion. *See* *Fernandez*, 231 F.3d at 1245; *see also* *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002); *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992). The trial court's decision to impose sanctions for a Jencks Act violation is reviewed for an abuse of discretion. *See* *United States v. McKoy*, 78 F.3d 446, 448 (9th Cir. 1996).

The district court's conclusion that specific attorney conduct violated local rules is reviewed de novo. *See* *United States v. Carona*, 660 F.3d 360, 364 (9th Cir. 2011); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993). The court's findings of fact in support of its imposition of sanctions are reviewed for clear error. *See* *Lopez*, 4 F.3d at 1458. To reverse a conviction for a discovery violation, this court must determine not only that the district court abused its discretion, but also that the error resulted in prejudice to substantial rights. *See* *United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007); *United States v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997); *United States v. de Cruz*, 82 F.3d 856, 866 (9th Cir. 1996).

12. Discriminatory (Selective) Prosecution

Absent a prima facie showing of discrimination based on suspect characteristics, *i.e.*, race, religion, or gender, a court may not review a prosecutor's decision to charge a particular defendant. *See* *United States v. Nelson*, 137 F.3d 1094, 1105 (9th Cir. 1998); *United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996). "These are essentially factual determinations which [are] review[ed] for clear error." *United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995); *Bauer*, 84 F.3d at 1560 (applying clear error); *United States v. Davis*, 36 F.3d 1424, 1432 (9th Cir. 1994) (same). However, this court noted that, "[i]n reviewing a selective prosecution claim, this circuit has employed both a de novo and a clear error standard." *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007) (electing not to resolve conflict).

The district court decision to dismiss an indictment based on a claim of selective prosecution is reviewed for clear error. *See* *Bauer*, 84 F.3d at 1560.

The court's ruling on a motion for discovery relating to a claim of discriminatory prosecution is reviewed for an abuse of discretion. *See* *United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997); *United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996). The court's ruling on the scope of discovery for a selective prosecution claim is also reviewed for an abuse of discretion. *See* *Candia-Veleta*, 104 F.3d at 246. Discovery should be permitted when the defendant is able to offer "some evidence tending to show the existence of the discriminatory effect element." *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (reversing Ninth Circuit's en banc decision at 48 F.3d 1508, 1512 (9th Cir. 1995)).

13. Dismissals

Generally, dismissal of an indictment based on legal error is reviewed de novo; dismissal based on discretionary authority is reviewed for an abuse of discretion. *See* *United States v. Brobst*, 558 F.3d 982, 994 (9th Cir. 2009) (supervisory powers); *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991); *but see* *United States v. Miller*, 4 F.3d 792, 794 (9th Cir. 1993) (electing not to decide appropriate standard to be applied to dismissal based on supervisory powers).

The denial of a motion to dismiss based on a violation of constitutional rights is reviewed de novo. *See* *Brobst*, 558 F.3d at 994 (due process); *United States v. Reveles-Espinoza*, 522 F.3d 1044, 1047 (9th Cir. 2008) (due process); *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002) (failure to retain a witness); *United States v. Ziskin*, 360 F.3d 934, 942-43 (9th Cir. 2003) (double jeopardy);*United States v. Hinojosa-Perez*, 206 F.3d 832, 835 (9th Cir. 2000) (motion to dismiss an information).[10]

[10] *See, e.g.*, *United States v. Price*, 314 F.3d 417, 420 (9th Cir. 2002) (double jeopardy); *United States v. Pitner*, 307 F.3d 1178, 1182 (9th Cir. 2002) (Sixth Amendment); *United States v. Hancock*, 231 F.3d 557, 561 (9th Cir. 2000) (due process and equal protection); *United States v. Munsterman*, 177 F.3d 1139, 1141 (9th Cir. 1999) (bills of attainder); *United States v. Romeo*, 114 F.3d 141, 142 (9th Cir. 1997) (collateral estoppel/double

The district court's decision whether to dismiss an indictment based on its interpretation of a federal statute is also reviewed de novo. *See, e.g.*, *United States v. Olander*, 572 F.3d 764, 766 (9th Cir. 2009); *United States v. W.R. Grace*, 504 F.3d 745, 751 (9th Cir. 2007) (18 U.S.C. § 3288); *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002) (Speedy Trial Act); *United States v. Boren*, 278 F.3d 911, 913 (9th Cir. 2002) (18 U.S.C. § 1014); *United States v. Gomez-Rodriguez*, 96 F.3d 1262, 1264 (9th Cir. 1996) (en banc).

The trial court's findings of fact with regard to a motion to dismiss are reviewed for clear error. *See United States v. Camacho-Lopez*, 450 F.3d 928, 929 (9th Cir. 2006); *Hinojosa-Perez*, 206 F.3d at 835.

Whether to dismiss an indictment to remedy a violation of recognized rights, to deter illegal conduct, or to preserve judicial integrity is an exercise of the district court's supervisory powers reviewed for an abuse of discretion. *See United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000); *United States v. Garza-Juarez*, 992 F.2d 896, 905 (9th Cir. 1993). Thus, the trial court's decision on a defendant's motion to dismiss for impermissible preindictment or pre-accusation delay is reviewed for an abuse of discretion. *See United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003); *United States v. Mills*, 280 F.3d 915, 920 (9th Cir. 2002); *United States v. Doe*, 149 F.3d 945, 947 (9th Cir. 1998); *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992).

The dismissal of an indictment without prejudice is reviewed for an abuse of discretion. *United States v. Adrian*, 978 F.2d 486, 493 (9th Cir. 1992), *overruled in part on other grounds by United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc).

A district court's ruling on the government's motion for leave to dismiss filed pursuant to Fed. R. Crim. P. 48(a) is reviewed for abuse of discretion, although the court's discretion to deny leave is limited. *See United States v. Garcia-Valenzuela*, 232 F.3d 1003, 1007 (9th Cir. 2000); *United States v. Gonzalez*, 58 F.3d 459, 461 (9th Cir. 1995) ("there is a

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jeopardy); *United States v. Fulbright*, 105 F.3d 443, 452 (9th Cir. 1997), *overruled in part on other grounds by United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (Fifth Amendment).

question as to whether a district court may ever deny an uncontested Rule 48(a) motion").

The court's decision to dismiss pursuant to Rule 48(b) for preindictment delay and pretrial delay is also limited and reviewed only for an abuse of discretion; however, dismissal "should be imposed only in extreme circumstances," especially when the dismissal is with prejudice. *See* *United States v. Jiang*, 214 F.3d 1099, 1101 (9th Cir. 2000); *United States v. Talbot*, 51 F.3d 183, 186 (9th Cir. 1995).

The district court's ruling on a motion to dismiss for noncompliance with the Speedy Trial Act is reviewed de novo. *See* *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002); *United States v. Symington*, 195 F.3d 1080, 1090-91 (9th Cir. 1999); *United States v. Pena-Carrillo*, 46 F.3d 879, 882 (9th Cir. 1995). The decision whether to dismiss with or without prejudice for a Speedy Trial Act violation is reviewed for an abuse of discretion; the district court abuses its discretion when it "fail[s] to set out relevant factual findings and to clearly articulate its application of statutory factors to the facts of the case." *United States v. White*, 864 F.2d 660, 661 (9th Cir. 1988) (citing *United States v. Taylor*, 487 U.S. 326, 344 (1988)). However, before a district court can enter a dismissal *without* prejudice, an evidentiary hearing must be held; otherwise, the district court shall enter a dismissal *with* prejudice. *See* *United States v. Delgado-Miranda*, 951 F.2d 1063, 1065 (9th Cir. 1991) (per curiam).

The district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. *See* *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011); *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007); *United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003); *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003); *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996); *cf.* *United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004) (even where no due process violation exists, reviewing district court's refusal to dismiss under abuse of discretion of its supervisory powers). The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. *See* *Gurolla*, 333 F.3d at 950; *United States v. Cuellar*, 96 F.3d 1179, 1182 (9th Cir. 1996). The court's decision whether to dismiss based on allegations of prosecutorial misconduct before a grand jury is also reviewed de novo. *See* *United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000); *United States v.*

De Rosa, 783 F.2d 1401, 1404 (9th Cir. 1986); *see also* *United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (abuse of the grand jury process).

The denial of a motion to dismiss an indictment for an alleged lack of jurisdiction is reviewed de novo. *See* *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002).

The district court's refusal to dismiss for a violation of the Interstate Agreement on Detainers Act is reviewed de novo. *United States v. Lualemaga*, 280 F.3d 1260, 1263 (9th Cir. 2002).

14. Evidentiary Hearings

A district court's decision whether to conduct an evidentiary hearing is generally reviewed for an abuse of discretion. *See* *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008) (habeas); *United States v. Saya*, 247 F.3d 929, 934 (9th Cir. 2001) (as amended) (jury misconduct); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158-60 (9th Cir. 2000).[11]

Note that in some instances the denial of a motion for an evidentiary hearing is reviewed de novo. *See* *United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004) (*Franks* hearing); *United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002) (*Franks* hearing) ; *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (use immunity); *cf.* *United States v. Smith*, 155 F.3d 1051, 1063 n.18 (9th Cir. 1998) (refusing to extend *Young* to suppression hearing).

The district court's timing of an evidentiary hearing is reviewed for an abuse of discretion. *See* *United States v. Montilla*, 870 F.2d 549, 551 (9th Cir. 1989), *amended by* 907 F.2d 115 (9th Cir. 1990). The court's decision regarding the scope of an evidentiary hearing is also reviewed for an abuse

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[11] *See, e.g.*, *United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1162 (9th Cir. 2007) (motion to suppress); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (habeas); *United States v. Hayes*, 231 F.3d 1132, 1135 (9th Cir. 2000) (Rule 35 motion); *United States v. Houston*, 217 F.3d 1204, 1206-07 (9th Cir. 2000) (sentencing).

of discretion. *See* *United States v. Hernandez*, 322 F.3d 592, 600 n.8 (9th Cir. 2003).

15. Ex Parte Hearings

A trial court's decision to conduct an ex parte hearing is reviewed for an abuse of discretion. *See* *United States v. Wills*, 88 F.3d 704, 711 (9th Cir. 1996) (court did not abuse its discretion); *United States v. Thompson*, 827 F.2d 1254, 1260-61 (9th Cir. 1987) (court abused its discretion).

16. Ex Post Facto

Whether a sentence violates the prohibition in Article I of the United States Constitution against ex post facto laws is reviewed de novo. *See* *Hunter v. Ayers*, 336 F.3d 1007, 1011 (9th Cir. 2003) (habeas); *see also* *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Staten*, 466 F.3d 708, 713 (9th Cir. 2006); *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997). A district court's ruling that the ex post facto clause was not violated is also reviewed de novo. *United States v. Canon*, 66 F.3d 1073, 1077 (9th Cir. 1995); *United States v. Walker*, 27 F.3d 417, 419 (9th Cir. 1994).

17. Extradition

Whether a valid extradition treaty exists is a question of law reviewed de novo. *See* *United States v. Merit*, 962 F.2d 917, 919 (9th Cir. 1992); *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 681 (9th Cir. 1983). Whether such an extradition treaty is in force is a legal question subject to de novo review. *See* *United States v. Tuttle*, 966 F.2d 1316, 1316 (9th Cir. 1992). Whether the district court had jurisdiction if the treaty was violated is reviewed de novo. *See* *United States v. Struckman*, 611 F.3d 560, 571 (9th Cir. 2010); *United States v. Anderson*, 472 F.3d 662, 666 (9th Cir. 2006). Interpretations of extradition treaties are reviewed de novo. *See* *Manta v. Chertoff*, 518 F.3d 1134, 1141 (9th Cir. 2008); *United States v. Lazarevich*, 147 F.3d 1061, 1063 (9th Cir. 1998); *Clarey v. Gregg*, 138 F.3d 764, 765 (9th Cir. 1998).

Whether an offense comes within an extradition treaty requires a determination of whether the offense is listed as an extraditable crime and whether the conduct is illegal in both countries. Both are questions of law

reviewed de novo. *See* *Anderson*, 472 F.3d at 666; *United States v. Van Cauwenberghe*, 827 F.2d 424, 428 (9th Cir. 1987); *Quinn v. Robinson*, 783 F.2d 776, 791-92 (9th Cir. 1986). "We review de novo whether extradition of a defendant satisfies the doctrines of 'dual criminality' and 'specialty.'" *United States v. Khan*, 993 F.2d 1368, 1372 (9th Cir. 1993); *see also* *Anderson*, 472 F.3d at 666. A district court's analysis of foreign law is reviewed de novo. *See* *United States v. Fowlie*, 24 F.3d 1059, 1064 (9th Cir. 1994).

Factual determinations made by the extradition tribunal will be reviewed under the clearly erroneous standard of review. *See* *Vo v. Benov*, 447 F.3d 1235, 1240 (9th Cir. 2006); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1405 (9th Cir. 1988); *Quinn*, 783 F.2d at 792. Denials of requests for discovery in extradition matters are reviewed for an abuse of discretion. *See* *Prasoprat v. Benov*, 421 F.3d 1009, 1014 (9th Cir. 2005).

The scope of habeas review of an extradition order is limited. *See* *Prasoprat*, 421 F.3d at 1013. Factual findings made by a magistrate judge in an extradition proceeding are reviewed for clear error. *See* *Sainez v. Venables*, 588 F.3d 713, 715 (9th Cir. 2009); *Vo*, 447 F.3d at 1240. A probable cause finding must be upheld if there is any competent evidence in the record to support it. *See* *Prasoprat*, 421 F.3d at 1013-15.

18. *Faretta* Requests (Waive Counsel)

Faretta v. California, 422 U.S. 806, 835 (1975), states that before a district court may grant a defendant's request to proceed pro se, there must be a showing that the defendant "knowingly and intelligently" waived the right to counsel. The validity of a *Faretta* waiver is a mixed question of law and fact reviewed de novo. *See* *United States v. Moreland*, 622 F.3d 1147, 1156 (9th Cir. 2010); *United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2000). Factual findings supporting the district court's decision are reviewed for clear error. *See* *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 50. Representation, e. Pro Se Representation.

19. *Franks* Hearing

The district court's refusal to conduct a *Franks* hearing is reviewed de novo. *See* *United States v. Flyer*, 633 F.3d 911, 916 (9th Cir. 2011); *United States v. Napier*, 436 F.3d 1133, 1136 (9th Cir. 2006); *United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003). The court's underlying factual findings are reviewed for clear error. *See* *Meek*, 366 F.3d at 716; *Shryock*, 342 F.3d at 975.

20. Fugitive Status

A district court's "ultimate" conclusion whether a defendant is a fugitive or is "fleeing from justice" is reviewed de novo. *See* *Man-Seok Choe v. Torres*, 525 F.3d 733, 741 (9th Cir. 2008) (habeas); *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994). The court's factual findings underlying that determination are reviewed under the clearly erroneous standard. *See* *Man-Seok*, 525 F.3d at 741; *Fowlie*, 24 F.3d at 1072; *United States v. Gonsalves*, 675 F.2d 1050, 1052 (9th Cir. 1982). Whether an appeal should be dismissed under the fugitive disentitlement doctrine is a matter of discretion vested with the appellate court. *See* *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1064 (9th Cir. 2004), *amended on denial of rehearing by* 449 F.3d 1059 (9th Cir. 2006); *United States v. Parretti*, 143 F.3d 508, 510 (9th Cir. 1998) (en banc) (dismissing appeal).

21. Grand Juries

The district court's refusal to dismiss an indictment based on alleged instructional errors to the grand jury is reviewed de novo. *See* *United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002) (per curiam); *see also* *United States v. Inzunza*, 638 F.3d 1006, 1016 (9th Cir. 2011). The court's decision whether to dismiss an indictment because of prosecutorial misconduct before a grand jury is reviewed de novo. *See* *United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000); *see also* *United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (reviewing alleged governmental abuse of grand jury proceedings). Note that errors in the grand jury indictment procedures are subject to harmless error review "unless the structural protections of the grand jury have been compromised." *See* *United States v. Du Bo*, 186 F.3d 1177, 1180 n.1 (9th Cir. 1999); *United States v. Oliver*, 60

F.3d 547, 549 (9th Cir. 1995); *see also* *United States v. Salazar-Lopez*, 506 F.3d 748, 752-56 (9th Cir. 2007).

The district court's denial of a defendant's motion to disclose grand jury testimony is reviewed for an abuse of discretion. *See* *United States v. Mincoff*, 574 F.3d 1186, 1192 (9th Cir. 2009); *United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997); *United States v. Perez*, 67 F.3d 1371, 1380 (9th Cir. 1995), *withdrawn in part on other grounds*, 116 F.3d 840 (9th Cir. 1997) (en banc). The court's resolution of a petition for disclosure of grand jury materials pursuant to Fed. R. Crim. P. 6(e) is reviewed for an abuse of discretion. *See* *In re Grand Jury Proceedings*, 62 F.3d 1175, 1178 (9th Cir. 1995). The denial of a motion to quash a grand jury subpoena is reviewed for an abuse of discretion. *See* *In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004).

A court's imposition of contempt sanctions related to grand jury proceedings is also reviewed for an abuse of discretion. *See* *In re Grand Jury Proceedings*, 40 F.3d 959, 961 (9th Cir. 1994) (refusal to sign disclosure directive); *In re Grand Jury Proceedings*, 33 F.3d 1060, 1061 (9th Cir. 1994) (per curiam) (refusal to produce records); *In re Grand Jury Proceedings*, 9 F.3d 1389, 1390 (9th Cir. 1993) (refusal to testify).

22. Guilty Pleas

a. Rule 11

The adequacy of a Rule 11 plea hearing is reviewed de novo. *See* *United States v. Pacheco-Navarette*, 432 F.3d 967, 969 (9th Cir. 2005); *United States v. Villalobos*, 333 F.3d 1070, 1073 (9th Cir. 2003); *United States v. Pena*, 314 F.3d 1152, 1155 (9th Cir. 2003). Whether the trial court's colloquy with the defendant satisfies the requirements of Rule 11 is also reviewed de novo. *See* *United States v. Ross*, 511 F.3d 1233, 1235 (9th Cir. 2008); *United States v. Barragan-Espinoza*, 350 F.3d 978, 981 (9th Cir. 2003); *United States v. King*, 257 F.3d 1013, 1021 (9th Cir. 2001); *see also* *United States v. Barrios-Gutierrez*, 255 F.3d 1024, 1027-28 (9th Cir. 2001) (en banc) (discussing Rule 11's requirements).

When a defendant fails to object, this court's review is limited to plain error. *See* *United States v. Benitez*, 542 U.S. 74, 83 (2004) (noting defendant's burden); *United States v. Vonn*, 535 U.S. 55, 58 (2002); *Ross*,

511 F.3d at 1235; *United States v. Monzon*, 429 F.3d 1268, 1271 (9th Cir. 2005). The appellate court may review, however, "the entire record, from the defendant's first appearance to his plea colloquy." *United States v. Vonn*, 294 F.3d 1093, 1093-94 (9th Cir. 2002) (on remand).

b. Voluntariness

The voluntariness of a guilty plea is subject to de novo review. *See United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Gaither*, 245 F.3d 1064, 1068 (9th Cir. 2001); *United States v. Kaczynski*, 239 F.3d 1108, 1114 (9th Cir. 2001); *United States v. Kikuyama*, 109 F.3d 536, 537 (9th Cir. 1997); *see also Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995) (habeas).

c. Withdrawal

A district court's decision whether to grant a motion for withdrawal of a guilty plea is reviewed for an abuse of discretion. *See United States v. Briggs*, 623 F.3d 724, 727 (9th Cir. 2010); *United States v. Showalter*, 569 F.3d 1150, 1154 (9th Cir. 2009); *United States v. Ross*, 511 F.3d 1233, 1235 (9th Cir. 2008); *United States v. Jones*, 472 F.3d 1136, 1140-41 (9th Cir. 2007); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1117 (9th Cir. 2003) (en banc) (applying "fair and just" standard); *United States v. Nostratis*, 321 F.3d 1206, 1208 (9th Cir. 2003); *United States v. Ruiz*, 257 F.3d 1030, 1032-33 (9th Cir. 2001) (en banc) (clarifying that "fair and just" rather than "manifest injustice" standard should be applied by district court).

23. Immunity Agreements

"[T]he decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch." *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984). Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. *See United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995); *United States v. Gamez-Orduno*, 235 F.3d 453, 465 (9th Cir. 2000) (reviewing immunity agreement de novo).

The denial of a *Kastigar* hearing is reviewed for an abuse of discretion. *See* *Dudden*, 65 F.3d at 1468; *but see* *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (district court's denial of a defense motion for an evidentiary hearing on use immunity raises mixed questions of fact and law reviewed de novo).

The district court's finding that the government's evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. *See* *United States v. Montoya*, 45 F.3d 1286, 1291 (9th Cir. 1995). Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. *See* *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999). Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. *See* *United States v Wilkes*, 662 F.3d 524, 532 (9th Cir. 2011); *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). Underlying factual findings are reviewed for clear error. *See* *Wilkes*, 662 F.3d at 532; *Alvarez*, 358 F.3d at 1216.

24. In Camera Proceedings

The trial court's decision whether to conduct an in camera proceeding is reviewed for an abuse of discretion. *See* *United States v. Alvarez*, 358 F.3d 1194, 1208 (9th Cir. 2004); *United States v. Henderson*, 241 F.3d 638, 646 (9th Cir. 2000); *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (crime fraud exception). The decision to seal documents is reviewed for an abuse of discretion. *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Mann*, 829 F.2d 849, 853 (9th Cir. 1987).

Whether the court erred by not allowing defense counsel to participate in an in camera proceeding is reviewed for an abuse of discretion. *See* *United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 1994). The court's decision regarding the scope of in camera review of privileged documents, however, is a mixed question of law and fact and is reviewed de novo. *See* *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 829 (9th Cir. 1994).

25. Indictments and Informations

a. Constructive Amendments

Whether an indictment was constructively amended is reviewed de novo. *See* *United States v. Lazarenko*, 564 F.3d 1026, 1034 (9th Cir. 2009); *United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir. 2004) (information); *United States v. Shryock*, 342 F.3d 948, 988 (9th Cir. 2003); *United States v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002). When the defendant fails to object, review is limited to plain error. *See* *United States v. Shipsey*, 190 F.3d 1081, 1085 (9th Cir. 1999).

b. Dismissals

See II. Criminal Proceedings, B. Pretrial Decisions, 13. Dismissals.

c. Duplicitous/Multiplicitous

Whether an indictment is multiplicitous – charging a single offense in more than one count – is reviewed de novo. *See* *United States v. Brooks*, 610 F.3d 1186, 1194 (9th Cir. 2010); *United States v. Vargas-Castillo*, 329 F.3d 715, 718-19 (9th Cir. 2003); *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998). Whether an indictment is duplicitous – charging more than one violation in each count – is reviewed de novo. *See* *United States v. Martin*, 4 F.3d 757, 759 (9th Cir. 1993) (duplicitous); *United States v. Yarborough*, 852 F.2d 1522, 1530 (9th Cir 1988). The court's decision not to dismiss an allegedly duplicitous indictment is reviewed de novo. *See* *United States v. Ramirez-Martinez*, 273 F.3d 903, 913 (9th Cir.2001), *overruled in part on other grounds by* *United States v. Lopez*, 484 F.3d 1186, 1191 (9th Cir. 2007) (en banc).

d. Misjoinder

Misjoinder of charges under Fed. R. Crim. P. 8(a) is an issue of law reviewed de novo. *See* *United States v. Jawara*, 474 F.3d 565, 572 (9th Cir. 2007); *United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995); *United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989) (distinguishing between Rule 8(a) and 8(b)). Misjoinder of defendants under Fed. R. Crim. P. 8(b) is also a question of law reviewed de novo. *See* *United States v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999); *United States v. Golb*, 69 F.3d

1417, 1425 (9th Cir. 1995); *United States v. Vasquez-Velasco*, 15 F.3d 833, 843 (9th Cir. 1994). Improper joinder is subject to harmless error review – reversal is required only if misjoinder results in actual prejudice because it had a "substantial and injurious effect or influence in determining the jury's verdict." *United States v. Lane*, 474 U.S. 438, 449 (1986).

The district court's order that two indictments be tried together under Fed. R. Crim. P. 13 is reviewed for an abuse of discretion. *See United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996).

e. Prosecutorial Misconduct

The district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. *See United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011); *United States v. Struckman*, 611 F.3d 560, 573 (9th Cir. 2010); *United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003); *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003); *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996); *cf. United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004) (even where no due process violation exists, reviewing district court's refusal to dismiss under abuse of discretion of its supervisory powers). The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. *See Struckman*, 611 F.3d at 573; *Gurolla*, 333 F.3d at 950; *United States v. Cuellar*, 96 F.3d 1179, 1182 (9th Cir. 1996).

Allegations of prosecutorial misconduct before a grand jury are also reviewed de novo. *See United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000); *United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986); *see also United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (abuse of the grand jury process).

A district court's refusal to disqualify the prosecutor is reviewed for an abuse of discretion. *See United States v. Davis*, 932 F.2d 752, 763 (9th Cir. 1991); *United States v. Plesinski*, 912 F.2d 1033, 1035 (9th Cir. 1990).

f. Sufficiency

The sufficiency of an indictment is reviewed de novo. *See United States v. O'Donnell*, 608 F.3d 546, 555 (9th Cir. 2010); *United States v.*

Rodriguez, 360 F.3d 949, 958 (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 988 (9th Cir. 2003). When defendant fails to object to the sufficiency of the indictment in the district court, review is for plain error. *See* *Rodriguez*, 360 F.3d at 958; *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002); *but see* *United States v. Lo*, 231 F.3d 471, 481 (9th Cir. 2000) (reviewing de novo when issue raised for the first time on appeal).

Whether a criminal information complies with constitutional requirements is examined de novo. *See* *Givens v. Housewright*, 786 F.2d 1378, 1380 (9th Cir. 1986). Whether an information is sufficient to charge a defendant in a particular situation is a question of law reviewed de novo. *See* *United States v. Hamilton*, 208 F.3d 1165, 1168 (9th Cir. 2000); *United States v. Linares*, 921 F.2d 841, 843 (9th Cir. 1990).

g. Validity

The validity of an indictment is reviewed de novo. *See* *United States v. Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002); *United States v. Matsumaru*, 244 F.3d 1092, 1099 (9th Cir. 2001); *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994). A claim that an indictment is defective may be raised at any time, *see* *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002); however, "review of an untimely objection to the sufficiency of the indictment is limited to the plain error test." *Id*; *United States v. Cotton*, 535 U.S. 625, 631-34 (2002). A "terminally defective" indictment constitutes a deficiency that is not subject to harmless error analysis. *See* *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). Technical deficiencies, however, are subject to harmless error review. *See* *United States v. Fleming*, 215 F.3d 930, 935-36 (9th Cir. 2000).

26. In Limine Orders

This court generally reviews the district court's ruling on a motion in limine for an abuse of discretion. *See* *United States v. Sutcliffe*, 505 F.3d 944, 958 (9th Cir. 2007); *United States v. Geston*, 299 F.3d 1130, 1138 (9th Cir. 2002); *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000). The trial court's decision to change an in limine ruling is also reviewed for an abuse of discretion. *See* *United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999).

A district court's order precluding certain testimony is an evidentiary ruling subject to review for an abuse of discretion. *See* *United States v. Lynch*, 437 F.3d 902, 913 (9th Cir. 2006); *United States v. Ravel*, 930 F.2d 721, 726 (9th Cir. 1991). If the order precludes the presentation of a defense, however, review is de novo. *See* *Ross*, 206 F.3d at 898-99.

27. Interpreters

"[T]he use of interpreters in the courtroom is a matter within the trial court's discretion, and . . . a trial court's ruling on such a matter will be reversed only for clear error." *United States v. Mayans*, 17 F.3d 1174, 1179 (9th Cir. 1994). The trial court's determination that a defendant needs an interpreter is also reviewed for an abuse of discretion. *See* *United States v. Petrosian*, 126 F.3d 1232, 1234 n.3 (9th Cir. 1997) (per curiam). The district court's decision not to declare a mistrial based on alleged interpreter's mistake is reviewed for an abuse of discretion. *See* *United States v. Long*, 301 F.3d 1095, 1105 (9th Cir. 2002).

28. Investigators

A district court's decision to deny funds for an investigator is reviewed for an abuse of discretion. *See* *United States v. Croft*, 124 F.3d 1109, 1125 n.7 (9th Cir. 1997).

29. Judicial Estoppel

The trial court's decision to invoke judicial estoppel in criminal proceedings is reviewed for an abuse of discretion. *See* *United States v. Ruiz*, 73 F.3d 949, 953 (9th Cir. 1996).

30. Judicial Notice

A district court's decision to take judicial notice is reviewed for an abuse of discretion. *See* *United States v. Daychild*, 357 F.3d 1082, 1099 n.26 (9th Cir. 2004); *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994).

31. Jurisdiction

Jurisdictional issues are reviewed de novo. *See* *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002); *United States v. Errol D. Jr.*, 292 F.3d 1159, 1161 (9th Cir. 2002). Whether a district court has jurisdiction is reviewed de novo. *See* *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003); *United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002). The assumption of jurisdiction by a district court is reviewed de novo. *See* *United States v. Juvenile Female*, 566 F.3d 943, 945 (9th Cir. 2009); *United States v. Ross*, 372 F.3d 1097, 1105 (9th Cir. 2004); *United States v. Bennett*, 147 F.3d 912, 913 (9th Cir. 1998); *United States v. Juvenile Male*, 118 F.3d 1344, 1346 (9th Cir. 1997). Note, however, that in instances where jurisdiction is intertwined with the merits and must be resolved by a jury, the appropriate standard of review is unsettled. *See* *Juvenile Male*, 118 F.3d at 1346; *United States v. Gomez*, 87 F.3d 1093, 1097 n.3 (9th Cir. 1996). *See also* *United States v. Cruz*, 554 F.3d 840, 843-44 (9th Cir. 2009) ("Although jurisdictional questions are ordinarily reviewed *de novo*, when a defendant brings a motion for acquittal in order to challenge the sufficiency of the *evidence* underlying a jurisdictional element, we owe deference to the jury's ultimate factual finding." (emphasis in original)).

A magistrate judge's assertion of jurisdiction is reviewed de novo. *See* *United States v. Real Property*, 135 F.3d 1312, 1314 (9th Cir. 1998) (civil forfeiture).

32. Jury Demand

A defendant's entitlement to a jury trial is a question of law reviewed de novo. *See* *United States v. Male Juvenile*, 280 F.3d 1008, 1021 (9th Cir. 2002); *United States v. Clavette*, 135 F.3d 1308, 1309 (9th Cir. 1998).

33. Jury Waiver

The adequacy of a defendant's jury waiver presents a mixed question of law and fact reviewed de novo. *See* *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997) (listing requirements for valid waiver); *United States v. Christensen*, 18 F.3d 822, 824 (9th Cir. 1994). Whether a district court should have allowed a defendant to waive trial by jury over the

objection of the government is a question of law subject to de novo review. *See* *United States v. Reyes*, 8 F.3d 1379, 1382 (9th Cir. 1993).

34. Juveniles

To prosecute a juvenile in federal court, the government must follow the certification procedures required by 18 U.S.C. § 5032. *See* *United States v. Juvenile Male*, 492 F.3d 1046, 1048 (9th Cir. 2007); *United States v. Doe*, 170 F.3d 1162, 1165 (9th Cir. 1999). Jurisdictional issues are reviewed de novo. *See* *United States v. Errol D., Jr.*, 292 F.3d 1159, 1161 (9th Cir. 2002); *Doe*, 170 F.3d at 1165. Compliance with § 5032 is a question of statutory interpretation reviewed de novo. *See* *United States v. James*, 556 F.3d 1062, 1065 (9th Cir. 2009); *United States v. C.M.*, 485 F.3d 492, 498 (9th Cir. 2007); *United States v. Jose D.L.*, 453 F.3d 1115, 1120 (9th Cir. 2006). Questions regarding the constitutionality of § 5032 are also reviewed de novo. *See* *United States v. Juvenile*, 228 F.3d 987, 990 (9th Cir. 2000). Note that compliance with § 5032 is subject to harmless error review if defendant objects and plain error review if no objection is made. *See* *United States v. Doe*, 366 F.3d 1069, 1077 & n.10 (9th Cir. 2004) (en banc).

The district court's decision to transfer a juvenile to adult court is reviewed for an abuse of discretion. *See* *Juvenile Male*, 492 F.3d at 1048; *United States v. Gerald N.*, 900 F.2d 189, 191 (9th Cir. 1990). Review of a juvenile delinquency sentence that falls within the sentencing guidelines is also abuse of discretion. *See* *United States v. Juvenile*, 347 F.3d 778, 784 (9th Cir. 2003).

Section 5033 requires that federal law enforcement agents notify parents of a juvenile's rights "immediately" after the juvenile is taken into custody. *See* *Jose D.L.*, 453 F.3d at 1119. The district court's ultimate determination that notification was "immediate" is reviewed de novo. *See* *id.* Whether a juvenile's parents have been notified pursuant to § 5033 is a predominantly factual question that is reviewed for clear error. *See* *id.*; *United States v. Juvenile (RRA-A)*, 229 F.3d 737, 742 (9th Cir. 2000); *United States v. Doe*, 219 F.3d 1009, 1014 (9th Cir. 2000).

Whether a juvenile has been arraigned without unreasonable delay is a mixed question of law and fact reviewed de novo. *See* *Jose D.L.*, 453 F.3d at 1120. Whether a juvenile is "in custody" is also a mixed question of law and fact reviewed de novo. *See* *United States v. Female Juvenile (Wendy*

G.), 255 F.3d 761, 765 (9th Cir. 2001). The court also reviews de novo whether a juvenile's speedy trial rights were violated. *See Juvenile RRA-A*, 229 F.3d at 742 (applying Juvenile Delinquency Act).

34. Lack of Prosecution

A district court's denial of a motion to dismiss under Fed. R. Crim. P. 48(b) is reviewed for abuse of discretion. *See United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007); *United States v. Barken*, 412 F.3d 1131, 1136 (9th Cir. 2005); *United States v. Sears, Roebuck & Co.*, 877 F.2d 734, 737-38 (9th Cir. 1989) (frequently cited and fullest discussion of standard). A Rule 48(b) dismissal should only be granted "in extreme circumstances." *Barken*, 412 F.3d at 1136.

35. Law of the Case

A district court's decision whether to apply the law-of-the-case doctrine is reviewed for an abuse of discretion. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (listing five different conditions allowing a court to stray from the law of the case). "Failure to apply the . . . law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Id.*

36. Lineups

Whether a pretrial lineup was impermissibly suggestive, and violates due process, is reviewed de novo. *See United States v. Bowman*, 215 F.3d 951, 966 n.9 (9th Cir. 2000); *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998). In making this determination, we review the totality of the circumstances. *United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996).

When a defendant fails to object to the lineup identification by way of a pretrial suppression motion, he waives his right to challenge it absent a showing of prejudice. *See United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision to admit or deny in-court identification testimony is reviewed for abuse of discretion. *See United States v. Dixon*, 201 F.3d 1223, 1229 (9th Cir. 2000). The court's ruling regarding the

admissibility of expert testimony on the reliability of eyewitness identification is reviewed for abuse of discretion. *See* *United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994).

37. Magistrate Judges

The delegation of authority and the scope of powers of a magistrate judge are questions of law reviewed de novo. *See* *United States v. Gamba*, 541 F.3d 895, 898 (9th Cir. 2008); *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1067 (9th Cir. 2004); *United States v. Colacurcio*, 84 F.3d 326, 328 (9th Cir. 1996). Whether a magistrate judge has jurisdiction is also a question of law reviewed de novo. *United States v. Carr*, 18 F.3d 738, 740 (9th Cir. 1994).[12] Whether a magistrate judge's "precise formulation" of a jury instruction is sufficient is reviewed for an abuse of discretion. *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998).

Factual findings made by a magistrate judge are reviewed for clear error. *See* *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 693 n. 4 (9th Cir. 2010); *Wildman v. Johnson*, 261 F.3d 832, 836 (9th Cir. 2001) (habeas). A magistrate judge's decision whether to conduct an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. *See* *United States v. Howell*, 231 F.3d 615, 620-21 (9th Cir. 2000).

A district court's decision regarding the scope of review of a magistrate judge's decision is reviewed for an abuse of discretion. *See* *Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002) (habeas). The district court's denial of a motion to reconsider a magistrate's pretrial order will be reversed only if "'clearly erroneous or contrary to law.'" *See* *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (quoting Fed. R. Civ. P. 72(a)); *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002) (habeas).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See* *United States v. Fernandez*, 388 F.3d 1199, 1252 (9th Cir. 2004). More specifically, "a magistrate judge's finding of probable cause to issue a search warrant is reviewed for clear error . . . ." *United States v. Nielsen*, 371 F.3d 574, 579 (9th Cir. 2004). Thus, the magistrate judge's original determination of probable cause is accorded "significant deference."

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[12] *See also* *United States v. Real Property*, 135 F.3d 1312, 1314 (9th Cir. 1998) (civil forfeiture).

See *United States v. Battershell*, 457 F.3d 1048, 1050 (9th Cir. 2006); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003). "This standard of review is less probing than de novo review and shows deference to the issuing magistrate's determination." *Fernandez*, 388 F.3d at 1252 (internal quotation marks omitted).

38. *Miranda* Rights

Whether a defendant was constitutionally entitled to *Miranda* warnings is an issue of law reviewed de novo. *See* *United States v. Wright*, 625 F.3d 583, 602 (9th Cir. 2010); *United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008); *United States v. Washington*, 462 F.3d 1124, 1132 (9th Cir. 2006); *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc). The trial court's decision to admit or suppress a statement that may have been obtained in violation of *Miranda* is also reviewed de novo. *See* *United States v. Brobst*, 558 F.3d 982, 995 (9th Cir. 2009); *Craighead*, 539 F.3d at 1082.[13]

The adequacy of a *Miranda* warning is a legal issue reviewed de novo. *See* *United States v. Williams*, 435 F.3d 1148, 1151 (9th Cir. 2006); *United States v. San Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002) (explaining why de novo review is appropriate). Factual findings underlying the adequacy challenge are reviewed for clear error. *See* *Craighead*, 539 F.3d at 1082; *United States v. Lares-Valdez*, 939 F.2d 688, 689 (9th Cir. 1991) (per curiam). *See also* *Wright*, 625 F.3d at 602 ("While determining whether a defendant is constitutionally entitled to *Miranda* warnings is subject to de novo review, it is nevertheless a fact-intensive inquiry.").

The voluntariness of a waiver of *Miranda* rights is reviewed de novo. *See* *Williams*, 435 F.3d at 1151; *United States v. Bautista*, 362 F.3d 584, 589 (9th Cir. 2004). Whether waiver was voluntary is a mixed question of fact and law reviewed de novo. *See* *United States v. Jennings*, 515 F.3d 980, 986 (9th Cir. 2008) ("Our review of the voluntariness of a *Miranda* waiver is de novo, but we will not disturb the district court's underlying factual findings unless they are clearly erroneous."); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1127 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005).

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[13] Admission of statements made in violation of *Miranda* are subject to harmless error review. *See* *United States v. Williams*, 435 F.3d 1148, 1151 (9th Cir. 2006).

"Voluntariness is determined by considering the totality of the circumstances, including *close scrutiny* of the facts." *Wright*, 625 F.3d at 603 (emphasis in original) (quotation marks and citation omitted). Whether the waiver was knowing and intelligent is reviewed for clear error. *See United States v. Shi*, 525 F.3d 709, 728 (9th Cir. 2008); *Rodriguez-Preciado*, 399 F.3d at 1127.

Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact reviewed de novo. *See United States v. Reyes-Bosque*, 596 F.3d 1017, 1031 (9th Cir. 2010); *United States v. Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009); *United States v. Kim*, 292 F.3d 969, 973 (9th Cir. 2002) (key case noting prior conflict and reaffirming de novo review). The district court's factual findings underlying that decision, such as what a defendant was told, are reviewed for clear error. *See Bassignani*, 575 F.3d at 883; *Kim*, 292 F.3d at 973.

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. *See United States v. Rodriguez*, 518 F.3d 1072, 1076 (9th Cir. 2008); *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005); *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir. 1994). Whether those words actually invoked the right to counsel is reviewed de novo. *See Rodriguez*, 518 F.3d at 1076.

Whether the public safety exception applies to the failure to give a *Miranda* warning is a mixed question of fact and law reviewed de novo. *See United States v. Reilly*, 224 F.3d 986, 992 (9th Cir. 2000); *United States v. Brady*, 819 F.2d 884, 886 (9th Cir. 1987).

Whether the prosecution's references to a defendant's retention of counsel and silence after a *Miranda* warning violates the Fifth Amendment is reviewed de novo. *See United States v. Ross*, 123 F.3d 1181, 1187 (9th Cir. 1997).

On habeas corpus review, the district court's decision that a defendant knowingly and voluntarily waived *Miranda* rights is a mixed question of law and fact reviewed de novo. *See Pollard v. Galaza*, 290 F.3d 1030, 1032 (9th Cir. 2002); *Collazo v. Estelle*, 940 F.2d 411, 415 (9th Cir. 1991) (en banc). Whether a defendant's *Miranda* waiver was knowing and intelligent is a factual issue reviewed for clear error. *See Collazo*, 940 F.2d at 416. Whether a defendant was "in custody" for purposes of *Miranda* is a mixed

question of law and fact reviewed de novo. *See* *Bains v. Cambra*, 204 F.3d 964, 972 (9th Cir. 2000).

39. Motion to Quash

The abuse of discretion standard applies to review of a trial court's decision to grant the government's motion to quash a subpoena under Fed. R. Crim. P. 17(c). *See* *United States v. George*, 883 F.2d 1407, 1418 (9th Cir. 1989). The district court's decision whether or not to quash a grand jury subpoena is reviewed for an abuse of discretion. *See* *In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004); *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995) (denial of motion to quash reviewed for abuse of discretion).

Whether a district court may conditionally enforce an IRS summons is a question of statutory interpretation reviewed de novo. *See* *United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc). A district court's decision to quash an IRS summons is reviewed, however, for clear error. *See* *David H. Tedder & Assocs. v. United States*, 77 F.3d 1166, 1169 (9th Cir. 1996). The court's decision to enforce a summons is also reviewed for clear error. *See* *United States v. Blackman*, 72 F.3d 1418, 1422 (9th Cir. 1995); *Fortney v. United States*, 59 F.3d 117, 119 (9th Cir. 1995) (applying clear error review to district court's denial of petition to quash); *but see* *Crystal v. United States*, 172 F.3d 1141, 1145 n.5 (9th Cir. 1999) (reviewing de novo when appeal is from grant of summary judgment denying petition to squash IRS subpoena).

40. Out-of-Court Identification

Whether a pretrial lineup was impermissibly suggestive is reviewed de novo. *See* *United States v. Bowman*, 215 F.3d 951, 966 n.9 (9th Cir. 2000). To determine whether such a procedure violated the defendant's due process rights, this court examines the totality of the surrounding circumstances. *See* *United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996); *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *amended by* 98 F.3d 1100 (9th Cir. 1996).

The constitutionality of a pretrial identification procedure is also reviewed de novo. *See* *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998). But when a defendant fails to object to the admission of the

identification by way of a pretrial suppression motion, he waives his right to challenge the identification absent a showing of prejudice. *See* *United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for an abuse of discretion. *See* *United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994).

41. Plea Agreements

a. Breaches/Enforcement

Alleged violations of plea agreements are reviewed de novo. *See* *United States v. Camarillo-Tello*, 236 F.3d 1024, 1026 (9th Cir. 2001). Whether the district court must enforce a plea agreement is a question of law reviewed de novo. *See* *United States v. Flores*, 559 F.3d 1016, 1019 (9th Cir. 2009); *United States v. Kuchinski*, 469 F.3d 853, 857 (9th Cir. 2006). Whether a district court is bound by the sentencing range in a plea agreement is also reviewed de novo. *See* *United States v. Perez-Corona*, 295 F.3d 996, 1000 (9th Cir. 2002).

The district court's grant or denial of a defendant's motion to compel specific performance of a plea agreement is reviewed for abuse of discretion. *See* *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) (reviewing grant of motion); *United States v. Anthony*, 93 F.3d 614, 616 (9th Cir. 1996) (reviewing denial of motion). Whether a district court has jurisdiction to enforce a plea agreement is reviewed de novo. *See* *United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002).

A defendant's failure to argue breach of the plea agreement before the district court limits appellate review to plain error. *See* *United States v. Cannel*, 517 F.3d 1172, 1176 (9th Cir. 2008); *United States v. Maldonado*, 215 F.3d 1046, 1051 (9th Cir. 2000).

Whether the government violated the terms of the agreement is reviewed de novo. *See* *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000). However, factual issues underlying an alleged breach of a plea agreement are reviewed for clear error. *United States v. Martinez*, 143 F.3d 1266, 1271 (9th Cir. 1998); *but see* *United States v. Franco-Lopez*, 312 F.3d

984, 988 (9th Cir. 2002) (noting inconsistency with de novo review established in *United States v. Schuman*, 127 F.3d 815, 817 (9th Cir.1997)).

A district court has broad discretion in fashioning a remedy for breach of a plea agreement. *See United States v. Chiu*, 109 F.3d 624, 626 (9th Cir. 1997).

b. Interpretation

There is conflicting case law concerning the proper standard for reviewing a district court's interpretation of a plea agreement. *See United States v. Ellis*, 641 F.3d 411, 417 (9th Cir. 2011); *United States v. Transfiguracion*, 442 F.3d 1222, 1227 (9th Cir. 2006); *compare United States v. Franklin*, 603 F.3d 652 (9th Cir. 2010); *United States v. Reyes*, 313 F.3d 1152, 1156 (9th Cir. 2002) ("A district court's interpretations of law are reviewed *de novo* and a district court's construction of a plea agreement is reviewed for clear error."); *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000) ("The district court's interpretation and construction of a plea agreement is reviewed for clear error."); *United States v. Floyd*, 1 F.3d 867, 869-70 (9th Cir. 1993) ("The district court's interpretation of a plea agreement is a finding of fact and is reviewed for clear error, but its application of the legal principles is a question of law reviewed de novo.") (citations omitted); *with United States v. Quach*, 302 F.3d 1096, 1100 (9th Cir. 2002) ("We review de novo a district court's interpretation of a plea agreement."); *United States v. Salemo*, 81 F.3d 1453, 1460 (9th Cir. 1996) ("We review a district court's interpretation of the terms of a plea agreement de novo."). Underlying factual findings are reviewed for clear error. *See Reyes*, 313 F.3d at 1156 ("[A] district court's construction of a plea agreement is reviewed for clear error."); *Clark*, 218 F.3d at 1095. Whether language in a plea agreement is ambiguous is reviewed de novo. *See Clark*, 218 F.3d at 1095.

c. Negotiations

Whether a district judge improperly participated in plea negotiations is a question of law reviewed de novo. *See United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993).

d. Waiver

Whether a defendant has waived his statutory right to appeal by plea agreement is reviewed de novo. *See* *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010); *United States v. Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005); *United States v. Bynum*, 362 F.3d 574, 583 (9th Cir. 2004). The validity of a waiver in a plea agreement is reviewed de novo. *See* *United States v. Ruiz*, 241 F.3d 1157, 1163 (9th Cir. 2001), *rev'd on other grounds*, 536 U.S. 622 (2002); *United States v. Littlejohn*, 224 F.3d 960, 964 (9th Cir. 2000). Whether a defendant may waive the prohibition against the introduction of plea negotiation statements is a question of law reviewed de novo. *See* *United States v. Rebbe*, 314 F.3d 402, 405 (9th Cir. 2002).

42. Preclusion of Proffered Defense

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. *See* *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Biggs*, 441 F.3d 1069, 1070 n.1 (9th Cir. 2006); *United States v. Gurolla*, 333 F.3d 944, 952 n.8 (9th Cir. 2003); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000).[14] Whether the court's instructions adequately cover the defendant's proffered defense is also reviewed de novo. *See* *United States v. Bello-Bahena*, 411 F.3d 1083, 1089 (9th Cir. 2005). However, whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed for abuse of discretion. *See* *id.*; *see also* *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011); *United States v. Perdomo-Espana*, 522 F.3d 983, 986 (9th Cir. 2008) (explaining various standards of review depending on focus of inquiry).

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[14] For specific defenses, *see* *United States v. Ibarra-Pino*, 657 F.3d 1000, 1003 (9th Cir. 2011) (duress); *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (entrapment); *United States v. Shryock*, 342 F.3d 948, 987 (9th Cir. 2003) (accomplice-corroboration & duress); *United States v. Pierre*, 254 F.3d 872, 875 (9th Cir. 2001) (lesser-included-offense); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001) (necessity); *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000) (motion in limine); *United States v. de Cruz*, 82 F.3d 856, 867 (9th Cir. 1996) (mistake of law).

Whether a challenged jury instruction precludes an adequate presentation of the defense theory of the case is reviewed de novo. *See* *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998); *United States v. Amlani*, 111 F.3d 705, 716 n.5 (9th Cir. 1997). Finally, a determination that a defendant has the burden of proving a defense is reviewed de novo. *See* *United States v. Leal-Cruz*, 431 F.3d 667, 670 (9th Cir. 2005); *United States v. Beasley*, 346 F.3d 930, 933 (9th Cir. 2003); *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998); *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1381 (9th Cir. 1991) (duress).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 10. Defenses.

43. Pre-indictment Delay

The district court's decision on a defendant's motion to dismiss for pre-indictment delay is reviewed for abuse of discretion. *See* *United States v. Gregory*, 322 F.3d 1157, 1160-61 (9th Cir. 2003); *United States v. Mills*, 280 F.3d 915, 920 (9th Cir. 2002).

A district court's decision whether to dismiss an indictment for violation of the constitutional right to a speedy trial is reviewed de novo. *See* *United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1114 (9th Cir. 2007); *Gregory*, 322 F.3d at 1160-61. A finding of prejudice is reviewed under the clearly erroneous standard. *See* *De Jesus Corona-Verbera*, 509 F.3d at 1114; *Gregory*, 322 F.3d at 1161.

44. Pretrial Detention and Release

Factual findings underlying a district court's detention order are reviewed under a deferential, clearly erroneous standard. *See* *United States v. Fidler*, 419 F.3d 1026, 1029 (9th Cir. 2005). The court's finding of potential danger to the community is entitled to deference. *See* *id.*; *Marino v. Vasquez*, 812 F.2d 499, 509 (9th Cir. 1987). The district court's interpretation of "community," as used in the Bail Reform Act, is reviewed de novo. *See* *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008). Also, whether the district court's factual findings justify pretrial detention is reviewed de novo. *See* *id.* at 1086-87. The court's finding that a defendant is a flight risk is also reviewed under the clearly erroneous standard. *See* *Fidler*, 419 F.3d at 1029; *United States v. Donaghe*, 924 F.2d 940, 945 (9th Cir. 1991). The ultimate "fleeing from justice" question, however, is

reviewed de novo, because "legal concepts that require us to exercise judgment dominate the mix of fact and law." *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 2. Bail.

45. Pretrial Hearings

A trial court's decision whether to hold a hearing on pretrial motions is reviewed for an abuse of discretion. *See United States v Marks*, 530 F.3d 799, 810 (9th Cir. 2008); *United States v. Hagege*, 437 F.3d 943, 951 (9th Cir. 2006); *United States v. Hernandez*, 424 F.3d 1056, 1058 (9th Cir. 2005) (suppression motion); *United States v. Alatorre*, 222 F.3d 1098, 1099 (9th Cir. 2000) (evidentiary ruling). *But see United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002) (denial of *Franks* hearing is reviewed de novo); *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (denial of evidentiary hearing on use immunity is reviewed de novo).

46. Pretrial Identifications

Whether a pretrial lineup was impermissibly suggestive is reviewed de novo. *See United States v. Bowman*, 215 F.3d 951, 966 n.9 (9th Cir. 2000). To determine whether such a procedure violated the defendant's due process rights, this court examines the totality of the surrounding circumstances. *See United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996); *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *amended by* 98 F.3d 1100 (9th Cir. 1996).

The constitutionality of a pretrial identification procedure is also reviewed de novo. *See United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998). Where the defendant fails to object to the admission of the identification by way of a pretrial suppression motion, however, he waives his right to challenge the identifications absent a showing of prejudice. *See United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision to admit in-court identification testimony is reviewed for an abuse of discretion. *United States v. Dixon*, 201 F.3d 1223, 1229 (9th Cir. 2000). The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness

identification is reviewed for an abuse of discretion. *See* *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996), *overruled in part on other grounds by* *United States v. W.R. Grace*, 526 F.3d 499, 502 (9th Cir. 2008) (en banc); *United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994).

47. Probable Cause

The determination of probable cause is a mixed question of law and fact reviewed de novo. *See* *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); *United States v. Lopez*, 482 F.3d 1067, 1071 (9th Cir. 2007). Thus, probable cause rulings are reviewed de novo. *See* *United States v. Borowy*, 595 F.3d 1045, 1047 (9th Cir. 2010) (per curiam); *Lopez*, 482 F.3d at 1071; *United States v. Williamson*, 439 F.3d 1125, 1135 n.8 (9th Cir. 2006).[15] However, underlying historical facts are reviewed for clear error. *See* *Williamson*, 439 F.3d at 1135 n.8; *United States v. Ortiz-Hernandez*, 427 F.3d 567, 573 (9th Cir. 2005); *United States v. Dorsey*, 418 F.3d 1038, 1042 (9th Cir. 2005).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See* *United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011); *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006) (according "great deference" to the magistrate judge's finding); *United States v. Fernandez*, 388 F.3d 1199, 1252 (9th Cir. 2004).[16] Thus, the magistrate judge's determination of probable cause is accorded deference by the reviewing court. *See Krupa*, 658 F.3d at 1177; *Hill*, 459 F.3d at 970 ("great deference"); *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004)

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[15] For specific examples *see, e.g.*, *United States v. Sandoval-Venegas*, 292 F.3d 1101, 1104 (9th Cir. 2002) (warrantless arrest); *United States v. Parks*, 285 F.3d 1133, 1141 (9th Cir. 2002) (vehicle search); *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 868 (9th Cir. 2001) (civil forfeiture); *Picray v. Sealock*, 138 F.3d 767, 770-71 (9th Cir. 1998) (warrantless arrest in § 1983 action); *United States v. Jones*, 84 F.3d 1206, 1210 (9th Cir. 1996) (probable cause to arrest).

[16] *See also* *Dawson v. City of Seattle*, 435 F.3d 1054, 1062 (9th Cir. 2006) (noting magistrate judge's finding of probable cause is reviewed for clear error); *United States v. Nielsen*, 371 F.3d 574, 579 (9th Cir. 2004) (same); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (same).

(same); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) ("significant deference").

A district court's determination of probable cause in a case with a redacted affidavit is reviewed de novo. *See United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992); *United States v. Grandstaff*, 813 F.2d 1353, 1355 (9th Cir. 1987) (search warrant); *see also United States v. Barajas-Avalos*, 377 F.3d 1040, 1058 (9th Cir. 2004) (reviewing de novo whether probable cause exists after tainted information has been redacted from an affidavit); *United States v. Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. *See United States v. Elliott*, 322 F.3d 710, 714 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 963 n.6 (9th Cir. 2000). The district court's factual findings whether any statements were false and omitted, and whether such statements were intentionally or recklessly made, are reviewed for clear error. *Elliott*, 322 F.3d at 714.

48. Recusal

A district court's decision whether to grant a motion for recusal is reviewed for an abuse of discretion. *See United States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002); *United States v. Silver*, 245 F.3d 1075, 1078 (9th Cir. 2001); *United States v. Scholl*, 166 F.3d 964, 977 (9th Cir. 1999).[17]

When recusal is not raised below, the allegation of judicial bias is reviewed for plain error. *See United States v. Spangle*, 626 F.3d 488, 495 (9th Cir. 2010); *United States v. Holland*, 519 F.3d 909, 911 (9th Cir. 2008); *United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991).

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[17] *See also United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995) (applying same standard to recusal in civil forfeiture action).

49. Regulations

A district court's interpretation of a federal regulation is reviewed de novo. *See* *United States v. Bohn*, 622 F.3d 1129, 1135 (9th Cir. 2010); *United States v. Bucher*, 375 F.3d 929, 931 (9th Cir. 2004); *United States v. Willfong*, 274 F.3d 1297, 1300 (9th Cir. 2001); *United States v. Ani*, 138 F.3d 390, 391 (9th Cir. 1998).[18] An agency's interpretation of regulations, however, is entitled to deference. *United States v. Bowen*, 172 F.3d 682, 685 (9th Cir. 1999); *United States v. McKittrick*, 142 F.3d 1170, 1173 (9th Cir. 1998). Whether a regulation is unconstitutionally vague is a question of law reviewed de novo. *See* *United States v. Elias*, 269 F.3d 1003, 1014 (9th Cir. 2001); *United States v. Coutchavlis*, 260 F.3d 1149, 1155 (9th Cir. 2001).

50. Representation

a. Conflict-Free Representation

This court reviews de novo whether a defendant was denied the right to conflict-free representation. *See* *United States v. Baker*, 256 F.3d 855, 859 (9th Cir. 2001) (habeas); *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998); *United States v. Cruz*, 127 F.3d 791, 801 (9th Cir. 1997) (direct appeal), *overruled in part on other grounds in* *United States v. Jimenez Recio*, 537 U.S. 270, 276-77 (2003).

b. Disqualification of Counsel

District judges have "substantial latitude" in deciding whether counsel must be disqualified; review is for an abuse of discretion. *See* *United States v. Frega*, 179 F.3d 793, 799 (9th Cir. 1999); *United States v. Stites*, 56 F.3d 1020, 1024 (9th Cir. 1995).

c. Hybrid Representation

The decision whether to allow a pro se litigant to proceed with either form of hybrid representation (co-counsel or advisory counsel) is reviewed for abuse of discretion. *See* *United States v. George*, 85 F.3d 1433, 1439 (9th Cir. 1996); *United States v. Bergman*, 813 F.2d 1027, 1030 (9th Cir.

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[18] *See also* *Santiago v. Rumsfeld*, 425 F.3d 549, 556 n.5 (9th Cir. 2005) (habeas).

1987). The court's denial of a request for hybrid representation is reviewed for an abuse of discretion. *See* *United States v. Olano*, 62 F.3d 1180, 1193 (9th Cir. 1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994).

d. Ineffective Representation

Whether a defendant received ineffective assistance of counsel is reviewed de novo both in direct appeals and on habeas.

- Direct appeals: *See* *United States v. Nickerson*, 556 F.3d 1014, 1018 (9th Cir. 2009); *United States v. Labrada-Bustamante*, 428 F.3d 1252, 1260 (9th Cir. 2005); *United States v. Mack*, 164 F.3d 467, 471 (9th Cir. 1999).
- Habeas: *See Frierson v. Woodford*, 463 F.3d 982, 988 (9th Cir. 2006) (§ 2254); *Earp v. Ornoski*, 431 F.3d 1158, 1182 (9th Cir. 2005); *Allen v. Woodford*, 395 F.3d 979, 992 (9th Cir. 2005) (§ 2254); *Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004) (§ 2254); *United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); *United States v. Alaimalo*, 313 F.3d 1188, 1191 (9th Cir. 2002) (§ 2255).

Ineffective assistance of counsel claims are mixed questions of fact and law to be reviewed de novo. *See* *Earp*, 431 F.3d at 1182; *Labrada-Bustamante*, 428 F.3d at 1260; *Dubria v. Smith*, 224 F.3d 995, 1000 (9th Cir. 2000) (en banc).

Note that claims of ineffective assistance of counsel are generally inappropriate on direct appeal. *See* *United States v. Moreland*, 622 F.3d 1147, 1157 (9th Cir. 2010); *United States v. Alferahin*, 433 F.3d 1148, 1160 n.6 (9th Cir. 2006) (noting when direct review is permissible and accepting review); *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) (declining review).

The district court's findings of fact are reviewed under the clearly erroneous standard. *See* *Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010); *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005) (en banc); *Allen*, 395 F.3d at 992; *United States v. Alvarez-Tautimez*, 160 F.3d 573, 575 (9th Cir. 1998).

The district court's decision not to conduct an evidentiary hearing on an ineffective assistance of counsel claim is reviewed for an abuse of discretion. *See* *Perez v. Rosario*, 449 F.3d 954, 964 (9th Cir. 2006) (§ 2254); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (§ 2255); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 50. Representation, f. Right to Counsel.

e. Pro Se Representation

Factual findings supporting the district court's decision whether to allow a defendant to proceed pro se are reviewed for clear error. *See* *United States v. Marks*, 530 F.3d 799, 816 (9th Cir. 2008); *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994). The validity of a *Faretta* waiver is a mixed question of law and fact reviewed de novo. *See* *United States v. Moreland*, 622 F.3d 1147, 1156 (9th Cir. 2010); *United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 18. *Faretta* Requests.

f. Right to Counsel

Whether a defendant was denied Sixth Amendment right to counsel is a question of law reviewed de novo. *See* *United States v. Danielson*, 325 F.3d 1054, 1066 (9th Cir. 2003) (direct appeal); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255); *United States v. Ortega*, 203 F.3d 675, 679 (9th Cir. 2000) (direct appeal); *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995) (coram nobis).

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. *See* *United States v. Rodriguez*, 518 F.3d 1072, 1076 (9th Cir. 2008); *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005). Whether those words actually invoked the right to counsel is reviewed de novo. *See* *Younger*, 398 F.3d at 1185; *United States v. Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999).

g. Substitution of Counsel

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. *See* *United States v. Lindsey*, 634 F.3d 541, 554 (9th Cir. 2011); *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010); *United States v. Mendez-Sanchez*, 563 F.3d 935, 942 (9th Cir. 2009); *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005); *United States v. McKenna*, 327 F.3d 830, 843 (9th Cir. 2003); *United States v. Smith*, 282 F.3d 758, 763 (9th Cir. 2002); *United States v. Corona-Garcia*, 210 F.3d 973, 976 (9th Cir. 2000); *United States v. Moore*, 159 F.3d 1154, 1159 n.3 (9th Cir. 1998).

In reviewing the district court's exercise of discretion, the court of appeals considers three factors: (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the extent of conflict between the defendant and counsel; and (3) the timeliness of the motion and the extent of resulting inconvenience and delay. *See* *Lindsey*, 634 F.3d at 554; *Rivera-Corona*, 618 F.3d at 978; *Prime*, 431 F.3d at 1154; *McKenna*, 327 F.3d at 843; *Smith*, 282 F.3d at 763.

Note that this court clarified that, in habeas review of a state court's denial of a motion to substitute counsel, review is not for an abuse of discretion, but whether the error violated the defendant's constitutional rights. *See* *Gonzales v. Knowles*, 515 F.3d 1006, 1012 (9th Cir. 2008); *Schell v. Witek*, 218 F.3d 1017, 1024-25 (9th Cir. 2000) (en banc) (overruling *Crandell v. Bunnell*, 144 F.3d 1213, 1215 (9th Cir. 1998)).

h. Waiver of Representation

Whether a defendant has voluntarily waived the right to counsel and elected self-representation is a mixed question of law and fact reviewed de novo. *See* *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007) (implicit waiver, direct appeal); *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001) (direct appeal); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2001) (direct appeal); *Lopez v. Thompson*, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc) (habeas). This court reviews de novo whether a defendant's waiver of the right to counsel was made knowingly, intelligently, and voluntarily. *See* *United States v. Springer*, 51 F.3d 861, 864 (9th Cir. 1995); *see also* *Sutcliffe*, 505 F.3d at 954, 956.

i. Withdrawal of Counsel

The trial court's decision to grant or deny an attorney's motion to withdraw as counsel is reviewed for an abuse of discretion. *See* *LaGrand v. Stewart*, 133 F.3d 1253, 1269 (9th Cir. 1998); *United States v. Roston*, 986 F.2d 1287, 1292 (9th Cir. 1993) (substitution of new counsel).

51. Sealed Materials

The district court's decision whether to seal documents is reviewed for an abuse of discretion. *See* *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Mann*, 829 F.2d 849, 853 (9th Cir. 1987).

52. Search and Seizure

The lawfulness of a search and seizure is reviewed de novo. *See* *United States v. Kriesel*, 508 F.3d 941, 946 n.6 (9th Cir. 2007); *United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005); *United States v. Deemer*, 354 F.3d 1130, 1132 (9th Cir. 2004); *United States v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000).

The trial court's underlying factual findings are reviewed for clear error. *See* *Stafford*, 416 F.3d at 1073; *Deemer*, 354 F.3d at 1132. "Where no findings of fact were made or requested, this court will uphold a trial court's denial of a motion to suppress if there was a reasonable view to support it." *United States v. Gooch*, 506 F.3d 1156, 1158 (9th Cir. 2007) (quoting *United States v. Becker*, 23 F.3d 1537, 1539 (9th Cir. 1994)).

This court reviews de novo a district court's ultimate legal conclusion whether a defendant has standing to challenge a search and seizure. *See* *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1116 (9th Cir. 2005); *United States v. Silva*, 247 F.3d 1051, 1054 (9th Cir. 2001); *United States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999); *United States v. Armenta*, 69 F.3d 304, 306-07 (9th Cir. 1995). The district court's factual findings underlying its decision on standing are reviewed for clear error. *See* *Gonzales*, 412 F.3d at 1116; *Armenta*, 69 F.3d at 307.

Whether an encounter between a defendant and officers constitutes a seizure is a mixed question of law and fact to be reviewed de novo. *See* *United States v. Smith*, 633 F.3d 889, 892 (9th Cir. 2011); *United States v.*

Washington, 490 F.3d 765, 769 (9th Cir. 2007); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1170 (9th Cir. 2005); *United States v. Enslin*, 327 F.3d 788, 792-93 (9th Cir. 2003); *United States v. Cormier*, 220 F.3d 1103, 1110 (9th Cir. 2000). However, the district court's underlying findings of fact are reviewed for clear error. *See Becerra-Garcia*, 397 F.3d at 1172; *Cormier*, 220 F.3d at 1110.

Whether an otherwise valid search or seizure was carried out in an unreasonable manner is determined under an objective test, on the basis of the facts and circumstances confronting the officers. *See Franklin v. Foxworth*, 31 F.3d 873, 875 (9th Cir. 1994) (civil rights action). The court's determination of "reasonableness" is reviewed de novo. *See id.*

a. Abandonment

Whether property has been abandoned within the meaning of the Fourth Amendment is an issue of fact reviewed for clear error. *See United States v. Stephens*, 206 F.3d 914, 916-17 (9th Cir. 2000); *United States v. Gonzales*, 979 F.2d 711, 712 (9th Cir. 1992).

b. Border Searches

The legality of a border search is reviewed de novo. *See United States v. Seljan*, 547 F.3d 993, 999 n.6 (9th Cir. 2008) (en banc) (packages); *United States v. Cortez-Rocha*, 394 F.3d 1115, 1118 (9th Cir. 2005) (car tire).[19] Note that reasonable suspicion is not required for every border search. *See United States v. Arnold*, 533 F.3d 1003, 1008 (9th Cir. 2008) ("[R]easonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border"). Whether a border detention was based on reasonable suspicion is reviewed de novo. *See United States v. Nava*, 363 F.3d 942, 944 (9th Cir. 2004); *United States v. Gonzalez-Rincon*, 36 F.3d 859, 863 (9th Cir. 1994). The district court's findings of fact are reviewed under the clearly erroneous standard. *See*

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[19] *See, e.g.*, *United States v. Abbouchi*, 502 F.3d 850, 854 n.1 (9th Cir. 2007) (package shipment); *United States v. Bennett*, 363 F.3d 947, 950 (9th Cir. 2004) (boat); *United States v. Vargas-Castillo*, 329 F.3d 715, 722 (9th Cir. 2003) (vehicle); *United States v. Okafor*, 285 F.3d 842, 845 (9th Cir. 2002) (plane); *United States v. Ani*, 138 F.3d 390, 391 (9th Cir. 1998) (mail); *United States v. Nates*, 831 F.2d 860, 862 (9th Cir. 1987).

United States v. Chen, 439 F.3d 1037, 1040 (9th Cir. 2006); *United States v. Camacho*, 368 F.3d 1182, 1183 (9th Cir. 2004); *Gonzalez-Rincon*, 36 F.3d at 863.

c. Coast Guard Searches

The lawfulness of a search and seizure by the Coast Guard, a mixed question of law and fact, is reviewed de novo. *See United States v. Dobson*, 781 F.2d 1374, 1376 (9th Cir. 1986). Whether the continued detention of a vessel after completion of a safety inspection by the Coast Guard is permissible based on reasonable suspicion is a question of law reviewed de novo. *See United States v. Thompson*, 282 F.3d 673, 676 (9th Cir. 2002).

d. Consent to Search

A district court's determination whether a defendant voluntarily consented to a search depends on the totality of circumstances and is a question of fact reviewed for clear error. *See United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007) (discussing five factors to consider); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1125-26 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005). The question whether as a general rule certain types of action give rise to an inference of consent to search is a question of law reviewed de novo. *See United States v. Albrektsen*, 151 F.3d 951, 953 (9th Cir. 1998); *United States v. Garcia*, 997 F.2d 1273, 1281 (9th Cir. 1993).

A trial court's findings on whether the scope of consent to a search has been exceeded will be upheld unless they are clearly erroneous. *See United States v. Russell*, 664 F.3d 1279, 1280 n.1 (9th Cir. 2012); *United States v. McWeeney*, 454 F.3d 1030, 1033-34 (9th Cir. 2006); *Rodriguez-Preciado*, 399 F.3d at 1131.

A district court's determination regarding authority to consent to a search is a mixed question of fact and law reviewed de novo. *See United States v. Ruiz*, 428 F.3d 877, 880 (9th Cir. 2005); *United States v. Kim*, 105 F.3d 1579, 1581 (9th Cir. 1997) (resolving previously undecided standard of review). A determination of apparent authority to consent is a mixed question of law and fact reviewed de novo. *See United States v. Stanley*, 653 F.3d 946, 951 (9th Cir. 2011); *Ruiz*, 428 F.3d at 880; *United States v. Enslin*, 327 F.3d 788, 792 (9th Cir. 2003); *United States v. Reid*, 226 F.3d 1020,

1025 (9th Cir. 2000); *United States v. Fiorillo*, 186 F.3d 1136, 1144 (9th Cir. 1999) (describing three-part analysis).

e. Exclusionary Rule

Whether the exclusionary rule is applicable to a given case is reviewed de novo while underlying factual findings are reviewed for clear error. *See United States v. Jefferson*, 566 F.3d 928, 933 (9th Cir. 2009); *United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1159 (9th Cir. 2007); *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc). Whether the rule applies to revocation hearings is reviewed de novo. *See United States v. Hebert*, 201 F.3d 1103, 1104 (9th Cir. 2000) (per curiam); *see also Grimes v. Commissioner*, 82 F.3d 286, 288 (9th Cir. 1996) (reviewing de novo whether rule applies to civil tax proceedings). Whether the good faith exception to the exclusionary rule applies in any given case is subject to de novo review. *See United States v. Krupa*, 658 F.3d 1174, 1179 (9th Cir. 2011); *United States v. Thai Tung Luong*, 470 F.3d 898, 902 (9th Cir. 2006); *United States v. Kurt*, 986 F.2d 309, 311 (9th Cir. 1993). Whether officers' conduct was sufficiently egregious to require application of the exclusionary rule is reviewed de novo. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994).

f. Exigent Circumstances

Exigent circumstances present a mixed question of law and fact reviewed de novo. *See United States v. Mancinas-Flores*, 588 F.3d 677, 687 (9th Cir. 2009); *United States v. Russell*, 436 F.3d 1086, 1089 n.2 (9th Cir. 2006); *United States v. Bynum*, 362 F.3d 574, 578-79 (9th Cir. 2004); *United States v. VonWillie*, 59 F.3d 922, 925 (9th Cir. 1995). Findings of fact underlying the district court's determination are reviewed for clear error. *Mancinas-Flores*, 588 F.3d at 687; *Russell*, 436 F.3d at 1089 n.4; *VonWillie*, 59 F.3d at 925.

g. Expectation of Privacy

Whether an individual had a reasonable expectation of privacy in property is a question of law reviewed de novo. *See United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007); *United States v. Gust*, 405 F.3d 797, 799 (9th Cir. 2005); *United States v. Shryock*, 342 F.3d 948, 977 (9th Cir. 2003). A finding that an individual had a subjective

expectation of privacy is reviewed for clear error. *See* *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993).

h. Governmental Conduct

"This court reviews the district court's determination that a particular search involves governmental conduct de novo." *United States v. Ross*, 32 F.3d 1411, 1413 (9th Cir. 1994) (per curiam).

i. Inevitable Discovery

Rulings regarding inevitable discovery present mixed questions of fact and law that are reviewed for clear error. *See* *United States v. Ruckes*, 586 F.3d 713, 716 (9th Cir. 2009); *United States v. Reilly*, 224 F.3d 986, 994 (9th Cir. 2000); *United States v. Lang*, 149 F.3d 1044, 1048 (9th Cir. 1998) (resolving prior unsettled standard).

j. Investigatory Stops

Whether an encounter between an individual and law enforcement authorities constitutes an investigatory stop is a mixed question of law and fact subject to de novo review. *See* *United States v. Michael R.*, 90 F.3d 340, 345 (9th Cir. 1996); *United States v. Kim*, 25 F.3d 1426, 1430 (9th Cir. 1994). Factual determinations underlying this inquiry are reviewed for clear error. *See* *United States v. Garcia-Acuna*, 175 F.3d 1143, 1145 (9th Cir. 1999); *Michael R.*, 90 F.3d at 345; *Kim*, 25 F.3d at 1430.

The specific question of whether reasonable suspicion existed under given facts is also subject to de novo review. *See* *United States v. Arvizu*, 534 U.S. 266, 275 (2002) (reaffirming de novo standard); *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Burkett*, 612 F.3d 1103, 1106 (9th Cir. 2010); *United States v. Johnson*, 581 F.3d 994, 998 (9th Cir. 2009); *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007); *United States v. Crapser*, 472 F.3d 1141, 1145 (9th Cir. 2007); *United States v. Miguel*, 368 F.3d 1150, 1153 (9th Cir. 2004); *United States v. Colin*, 314 F.3d 439, 442 (9th Cir. 2002); *United States v. Fuentes*, 105 F.3d 487, 490 (9th Cir. 1997) (propriety of a *Terry* stop is reviewed de novo). Underlying factual findings are reviewed for clear error. *See* *Ornelas*, 517 U.S. at 699; *United States v. Drake*, 543 F.3d 1080, 1087 (9th Cir. 2008); *Berber-Tinoco*, 510 F.3d at 1087; *United States v. Choudhry*, 461 F.3d 1097, 1100 (9th Cir.

2006); *Colin*, 314 F.3d at 442; *United States v. Lopez-Soto*, 205 F.3d 1101, 1103 (9th Cir. 2000).

Whether a seizure exceeds the bounds of a valid investigatory stop and becomes a de facto arrest is reviewed de novo. *See United States v. Thompson*, 282 F.3d 673, 676 (9th Cir. 2002); *United States v. Torres-Sanchez*, 83 F.3d 1123, 1127 (9th Cir. 1996). Whether the scope of a vehicle stop exceeded the permissible scope of a traffic stop is reviewed de novo. *See United States v. Garcia-Rivera*, 353 F.3d 788, 791 (9th Cir. 2003). Whether an encounter between a defendant and officers constitutes a seizure is a mixed question of law and fact reviewed by this court de novo. *See United States v. Smith*, 633 F.3d 889, 892 (9th Cir. 2011); *United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1170 (9th Cir. 2005); *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000). A district court's determination that a police officer lawfully crossed the threshold of a dwelling to effect an arrest is reviewed de novo. *See United States v. Albrektsen*, 151 F.3d 951, 953 (9th Cir. 1998).

k. Issuance of a Search Warrant

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011); *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006) (noting finding of probable cause is reviewed for clear error); *United States v. Fernandez*, 388 F.3d 1199, 1252 (9th Cir. 2004).[20] Thus, the magistrate judge's determination of probable cause is accorded deference by the reviewing court. *See Krupa*, 658 F.3d at 1177; *Hill*, 459 F.3d at 970 ("great deference"); *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004) (same); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) ("significant deference"). The court of appeals "will not reverse a magistrate judge's determination of probable cause for the purposes of issuing a search warrant absent a finding of clear error." *United States v. Perez*, 67 F.3d 1371, 1382 (9th Cir. 1995), *withdrawn in part*, 116 F.3d 840 (9th Cir. 1997) (en banc); *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir.

[20] *See also United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003); *United States v. Nielsen*, 371 F.3d 574, 579 (9th Cir. 2004) (noting finding of probable cause is reviewed for clear error); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (same).

1993). Thus, the standard of review is "less probing than de novo review and shows deference to the issuing magistrate's determination." *Pitts*, 6 F.3d at 1369; *United States v. Hernandez*, 937 F.2d 1490, 1494 (9th Cir. 1991).

A district court's determination of probable cause in a case with a redacted affidavit is reviewed de novo. *See United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992); *United States v. Grandstaff*, 813 F.2d 1353, 1355 (9th Cir. 1987) (search warrant); *see also United States v. Barajas-Avalos*, 377 F.3d 1040, 1058 (9th Cir. 2004) (reviewing de novo whether probable cause exists after tainted information has been redacted from an affidavit); *United States v. Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. *See United States v. Elliott*, 322 F.3d 710, 714 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 963 n.6 (9th Cir. 2000). The district court's factual findings whether any statements were false and omitted, and whether such statements were intentionally or recklessly made, are reviewed for clear error. *See Elliott*, 322 F.3d at 714.[21]

l. Knock and Announce

Compliance with "knock and announce" standards established by statute is reviewed de novo. *See United States v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002); *United States v. Granville*, 222 F.3d 1214, 1217 (9th Cir. 2000); *United States v. Hudson*, 100 F.3d 1409, 1417 (9th Cir. 1996) (reviewing de novo the validity of a protective sweep, including compliance with knock and announce requirements). Underlying factual findings are reviewed for clear error. *See Chavez-Miranda*, 306 F.3d at 980; *Granville*, 222 F.3d at 1217. Whether exigent circumstances existed to excuse an officer's noncompliance with the knock and announce rule is a mixed question of law and fact reviewed de novo. *See United States v. Bynum*, 362 F.3d 574, 578-79 (9th Cir. 2004); *United States v. Peterson*, 353

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[21] *See also Liston v. County of Riverside*, 120 F.3d 965, 973 (9th Cir. 1997) (civil rights action based on unlawful search).

F.3d 1045, 1048 (9th Cir. 2004); *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000); *Hudson*, 100 F.3d at 1417.

m. Private Searches

A district court's conclusion that a search did not violate the Fourth Amendment because it was a private search is reviewed de novo as a question of law. *See United States v. Reed*, 15 F.3d 928, 930 (9th Cir. 1994).

n. Probable Cause

The determination of probable cause is a mixed question of law and fact in which the legal issues predominate, and it is therefore subject to de novo review. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); *United States v. Borowy*, 595 F.3d 1045, 1047 (9th Cir. 2010) (per curiam); *United States v. $493,850.00 in United States Currency*, 518 F.3d 1159, 1164 (9th Cir. 2008) (currency forfeiture); *United States v. Dorsey*, 418 F.3d 1038, 1042 (9th Cir. 2005) (warrantless arrest).[22] However, underlying historical facts are reviewed for clear error. *See Borowy*, 595 F.3d at 1048; *Williamson*, 439 F.3d at 1135 n.8; *Sandoval-Venegas*, 292 F.3d at 1104; *Parks*, 285 F.3d at 1141.

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 52. Search and Seizure, k. Issuance of a Search Warrant.

o. Probation/Parole Searches

The denial of a motion to suppress the fruits of a warrantless parole search is reviewed de novo. *See United States v. Hebert*, 201 F.3d 1103,

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[22] *See United States v. Williamson*, 439 F.3d 1125, 1135 n.8 (9th Cir. 2006) (search warrant); *United States v. Sandoval-Venegas*, 292 F.3d 1101, 1104 (9th Cir. 2002) (warrantless arrest); *United States v. Parks*, 285 F.3d 1133, 1141 (9th Cir. 2002) (vehicle search); *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 868 (9th Cir. 2001) (civil forfeiture); *Picray v. Sealock*, 138 F.3d 767, 770-71 (9th Cir. 1998) (warrantless arrest in § 1983 action); *United States v. Jones*, 84 F.3d 1206, 1210 (9th Cir. 1996) (probable cause to arrest).

1104 (9th Cir. 2000). The district court's factual determination that a probation search was not impermissible is reviewed for clear error. *See United States v. Watts*, 67 F.3d 790, 794 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 148 (1997). The district court's determination of the reasonable scope of a probation search is a mixed question of fact and law reviewed de novo. *See United States v. Davis*, 932 F.2d 752, 756 (9th Cir. 1991). Whether a probation search was a subterfuge for a criminal investigation is a factual determination that is reviewed for clear error. *See United States v. Knights*, 219 F.3d 1138, 1141 (9th Cir. 2000), *rev'd on other grounds*, 534 U.S. 112 (2001).

p. Protective Sweeps

De novo review applies to a trial court's determination of the validity of a protective sweep, including compliance with statutory "knock and announce" requirement. *See United States v. Hudson*, 100 F.3d 1409, 1417 (9th Cir. 1996).[23] Whether exigent circumstances existed to excuse an officer's noncompliance with the knock and announce rule is a mixed question of law and fact reviewed de novo. *See United States v. Bynum*, 362 F.3d 574, 578-79 (9th Cir. 2004); *United States v. Peterson*, 353 F.3d 1045, 1048 (9th Cir. 2004); *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000).

q. Reasonable Suspicion

The specific question of whether reasonable suspicion existed under given facts is subject to de novo review. *See United States v. Arvizu*, 534 U.S. 266, 275 (2002) (reaffirming de novo standard); *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Burkett*, 612 F.3d 1103, 1106 (9th Cir. 2010); *United States Johnson*, 581 F.3d 994, 998 (9th Cir. 2009); *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007); *United States v. Crapser*, 472 F.3d 1141, 1145 (9th Cir. 2007); *United States v. Miguel*, 368 F.3d 1150, 1153 (9th Cir. 2004); *United States v. Colin*, 314

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[23] *See also United States v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002) (noting compliance with "knock and announce" standards is reviewed de novo); *United States v. Granville*, 222 F.3d 1214, 1217 (9th Cir. 2000) (noting de novo review applies to legal conclusion that "knock and announce" statute was violated while clear error review applies to findings of historical facts underlying conclusion).

F.3d 439, 442 (9th Cir. 2002); *United States v. Fuentes*, 105 F.3d 487, 490 (9th Cir. 1997) (propriety of a *Terry* stop is reviewed de novo). Underlying factual findings are reviewed for clear error. *See Ornelas*, 517 U.S. at 699; *United States v. Drake*, 543 F.3d 1080, 1087 (9th Cir. 2008); *Berber-Tinoco*, 510 F.3d at 1087; *United States v. Choudhry*, 461 F.3d 1097, 1100 (9th Cir. 2006); *Colin*, 314 F.3d at 442; *United States v. Lopez-Soto*, 205 F.3d 1101, 1103 (9th Cir. 2000).

r. Rule 41(g) Motions

Note that "Rule 41(e) was changed to Rule 41(g) in 2002 and amended for stylistic purposes only." *United States v. Kaczynski*, 416 F.3d 971, 973 n.3 (9th Cir. 2005).

A district court's interpretation of Fed. R. Crim. P. 41(g) is reviewed de novo. *See Kaczynski*, 416 F.3d at 974; *J.B. Manning Corp. v. United States*, 86 F.3d 926, 927 (9th Cir. 1996). The denial of a motion for return of property pursuant to Rule 41(g) is reviewed de novo. *See United States v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008); *Kaczynski*, 416 F.3d at 974; *United States v. Ritchie*, 342 F.3d 903, 906 (9th Cir. 2003); *In re Grand Jury Investigation Concerning Solid State Devices, Inc.*, 130 F.3d 853, 855 (9th Cir. 1997); *but see United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1172 (9th Cir. 2010) (en banc) (per curiam) (explaining that when Rule 41(g) motion "is made by a party against whom no criminal charges have been brought, such a motion is in fact a petition that the district court invoke its civil equitable jurisdiction" which is reviewed for abuse of discretion); *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993) (district court's decision to exercise its equitable jurisdiction under Rule 41(e) is reviewed for an abuse of discretion). The trial court's decision not to hold an evidentiary hearing on a Rule 41(g) motion is reviewed for an abuse of discretion. *See Ctr. Art Galleries-Haw., Inc. v. United States*, 875 F.2d 747, 753 (9th Cir. 1989), *superseded by statute as state in J.B. Manning Corp. v. United States*, 86 F.3d 926 (9th Cir. 1996).

s. Suppression Motions

Motions to suppress are reviewed de novo. *See United States v. Rodgers*, 656 F.3d 1023, 1026 (9th Cir. 2011); *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011); *United States v. Smith*, 633 F.3d 889, 892 (9th Cir. 2011); *United States v. Giberson*, 527 F.3d 882, 886 (9th Cir.

2008); *United States v. Snipe*, 515 F.3d 947, 950 (9th Cir. 2008); *United States v. Forrester*, 512 F.3d 500, 506 (9th Cir. 2008) ("Conclusions of law underlying the denial of a motion to suppress evidence are also reviewed de novo"); *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc).

The trial court's factual findings are reviewed for clear error. *See Rodgers*, 656 F.3d at 1026; *United States v. McCarty*, 648 F.3d 820, 824 (9th Cir. 2011); *Giberson*, 527 F.3d at 886; *Snipe*, 515 F.3d at 950; *United States v. Gooch*, 506 F.3d 1156, 1158 (9th Cir. 2007); *United States v. Aukai*, 497 F.3d 955, 958 (9th Cir. 2007).

Whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. *See United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1163 (9th Cir. 2007); *United States v. Hernandez*, 424 F.3d 1056, 1058 (9th Cir. 2005); *see also United States v. Schafer*, 625 F.3d 629, 635-36 (9th Cir. 2010). Whether to grant or deny a motion to continue a suppression hearing is reviewed for an abuse of discretion. *See United States v. Mejia*, 69 F.3d 309, 314 (9th Cir. 1995) (setting forth five factors for considering whether district court abused its discretion).

Whether to reconsider a suppression order at trial is reviewed for abuse of discretion. *See United States v. Buffington*, 815 F.2d 1292, 1298 (9th Cir. 1987). Failure to apply the doctrine of law of the case to the motion for reconsideration absent one of the requisite conditions of that doctrine constitutes an abuse of discretion. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997); *see also United States v. Renteria*, 557 F.3d 1003, 1006 (9th Cir. 2009). The district court's denial of a motion to reconsider and to reopen a suppression hearing is reviewed for an abuse of discretion. *See United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

t. *Terry* Stops

The propriety of a *Terry* stop is reviewed de novo. *See United States v. Grigg*, 498 F.3d 1070, 1074 (9th Cir. 2007); *United States v. $109,179 in U.S. Currency*, 228 F.3d 1080, 1083-84 (9th Cir. 2000). The determination whether an investigatory stop is a warrantless arrest or a *Terry* stop, is a mixed question of law and fact, reviewed de novo. *See United States v. Charley*, 396 F.3d 1074, 1079 (9th Cir. 2005); *$109,179 in U.S. Currency*,

228 F.3d at 1084; *United States v. Harrington*, 923 F.2d 1371, 1373 (9th Cir. 1991). A trial judge's determination of reasonable suspicion to stop based on specific, articulated facts is reviewed de novo. *See United States v. Burkett*, 612 F.3d 1103, 1106-07 (9th Cir. 2010); *United States v. Johnson*, 581 F.3d 994. 998-99 (9th Cir. 2009); *United States v. Thompson*, 282 F.3d 673, 678 (9th Cir. 2002); *United States v. King*, 244 F.3d 736, 738 (9th Cir. 2001); *United States v. Hall*, 974 F.2d 1201, 1204 (9th Cir. 1992); *United States v. Carrillo*, 902 F.2d 1405, 1410-11 (9th Cir. 1990).[24]

u. Warrantless Searches and Seizures

The validity of a warrantless search is reviewed de novo. *See United States v. Franklin*, 603 F.3d 652, 655 (9th Cir. 2010); *United States v. Dorsey*, 418 F.3d 1038, 1042 (9th Cir. 2005); *United States v. Johnson*, 256 F.3d 895, 905 (9th Cir. 2001) (en banc); *United States v. Hinton*, 222 F.3d 664, 673 (9th Cir. 2000). Underlying factual findings are reviewed for clear error. *See Franklin*, 603 F.3d at 655; *Dorsey*, 418 F.3d at 1042.

The validity of a warrantless entry into a residence is reviewed de novo. *See United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992). Whether an area is within the protected curtilage of a home is also reviewed de novo. *See United States v. Barajas-Avalos*, 377 F.3d 1040, 1054 (9th Cir. 2004); *United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001); *United States v. Johnson*, 256 F.3d 895, 909 n.1 (9th Cir. 2001) (en banc) (overruling prior cases that applied clear error standard); *but see United States v. Romero-Bustamente*, 337 F.3d 1104, 1107-08 n.2 (9th Cir. 2003) (questioning *Johnson*).

The validity of a warrantless seizure is reviewed de novo. *See United States v. Hernandez*, 313 F.3d 1206, 1208 (9th Cir. 2002) (package); *United States v. Gill*, 280 F.3d 923, 928 (9th Cir. 2002) (mail); *United States v. Sarkissian*, 841 F.2d 959, 962 (9th Cir. 1988) (exigent circumstances); *United States v. Vasey*, 834 F.2d 782, 785 (9th Cir. 1987) (incident to arrest); *United States v. Howard*, 828 F.2d 552, 554 (9th Cir. 1987) (exigent circumstances and consent).

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[24] *See also United States v. Fernandez-Castillo*, 324 F.3d 1114, 1117 (9th Cir. 2003) (reviewing de novo whether investigatory stop was supported by reasonable suspicion under the totality of the circumstances).

In *United States v. Rosi*, 27 F.3d 409, 411 (9th Cir. 1994), this court applied the clearly erroneous standard to "the validity of the warrantless entry and warrantless search." *Id.* The court reasoned that unlike other cases applying a de novo standard to "the formulation of a general rule . . . applicable to a wide class of cases," this case involved "an unusual set of factual circumstances that required the district court to weigh and evaluate various live testimony given at the suppression hearing." *Id.* at 411 n.1. *See also United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1125 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005); *United States v. Patayan Soriano*, 361 F.3d 494, 501 (9th Cir. 2004).

Whether exigent circumstances justify a warrantless search or seizure is a mixed question of law and fact reviewed de novo. *See United States v. Mancinas-Flores*, 588 F.3d 677, 687 (9th Cir. 2009); *United States v. Russell*, 436 F.3d 1086, 1089 n.2 (9th Cir. 2006); *United States v. Gooch*, 6 F.3d 673, 679 (9th Cir. 1993). Whether probable cause supports a warrantless search of an automobile is a question of law reviewed de novo. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Ibarra*, 345 F.3d 711, 715 (9th Cir. 2003); *United States v. Dunn*, 946 F.2d 615, 619 (9th Cir. 1991). Whether probable cause supports a warrantless arrest is also reviewed de novo, while underlying facts reviewed for clear error. *See United States v. Dorsey*, 418 F.3d 1038, 1042 (9th Cir. 2005).

53. Selective Prosecution

This court noted that it "has employed both a de novo standard and a clearly erroneous standard when reviewing a selective prosecution claim." *See United States v. Culliton*, 328 F.3d 1074, 1080-81 (9th Cir. 2003) (electing not to resolve conflict); *see also United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007); *United States v. Moody*, 778 F.2d 1380, 1385 (9th Cir. 1985) (noting but not resolving conflict between clear error and abuse of discretion standards). Before, however, this court reviewed for clear error. *See United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995); *United States v. Davis*, 36 F.3d 1424, 1432 (9th Cir. 1994); *United States v. Leidendeker*, 779 F.2d 1417, 1418 (9th Cir. 1986); *United States v. Wilson*, 639 F.2d 500, 503 n.2 (9th Cir. 1981) (explaining that clear error standard was chosen because "selective prosecution, more than vindictive prosecution, lends itself to the factfinding standard").

The district court decision to dismiss an indictment based on a claim of selective prosecution is reviewed for clear error. *See* *United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996). The court's ruling on a motion for discovery relating to a claim of discriminatory prosecution is reviewed for an abuse of discretion. *See* *United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997); *United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996). The court's ruling on the scope of discovery for a selective prosecution claim is also reviewed for an abuse of discretion. *See* *Candia-Veleta*, 104 F.3d at 246. Discovery should be permitted when the defendant can offer "some evidence tending to show the existence of the discriminatory effect element." *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (reversing Ninth Circuit's en banc decision at 48 F.3d 1508, 1512 (9th Cir. 1995)).

54. Severance

A district court's decision on a motion for severance is reviewed for an abuse of discretion. *See* *United States v. Stinson*, 647 F.3d 1196, 1205 (9th Cir. 2011); *United States v. Sullivan*, 522 F.3d 967, 981 (9th Cir. 2008); *United States v. Lopez*, 477 F.3d 1110, 1113 (9th Cir. 2006); *United States v. Decoud*, 456 F.3d 996, 1008 (9th Cir. 2006) (defendants); *United States v. Alvarez*, 358 F.3d 1194, 1206 (9th Cir. 2004) (defendants); *United States v. Vargas-Castillo*, 329 F.3d 715, 722 (9th Cir. 2003) (counts); *United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999); *United States v. Gillam*, 167 F.3d 1273, 1276 (9th Cir. 1999).

The test for abuse of discretion is whether a joint trial was so manifestly prejudicial as to require the trial court to exercise its discretion in but one way, by ordering a separate trial. *See* *United States v. Jenkins*, 633 F.3d 788, 807 (9th Cir. 2011); *Sullivan*, 522 F.3d at 981; *Decoud*, 456 F.3d at 1008; *United States v. Johnson*, 297 F.3d 845, 855 (9th Cir. 2002); *United States v. Nelson*, 137 F.3d 1094, 1108 (9th Cir. 1998); *Gillam*, 167 F.3d at 1276. Defendants must meet a heavy burden to show such an abuse, and the trial judge's decision will seldom be disturbed. *See* *United States v. Ponce*, 51 F.3d 820, 831 (9th Cir. 1995). The defendant must prove that prejudice from the joint trial was so "clear, manifest or undue" that he or she was denied a fair trial. *See* *United States v. Throckmorton*, 87 F.3d 1069, 1071-72 (9th Cir. 1996); *see also* *Alvarez*, 358 F.3d at 1206 (defendant has burden of proving "clear, manifest, or undue prejudice" from joint trial).

55. Sixth Amendment Rights

Whether a defendant was denied his Sixth Amendment right to counsel is a question of law reviewed de novo. *See* *United States v. Danielson*, 325 F.3d 1054, 1066 (9th Cir. 2003) (direct appeal); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255).[25] Whether a defendant has knowingly, voluntarily, and intelligently waived his Sixth Amendment right to counsel is a mixed question of law and fact reviewed de novo. *See* *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2001); *United States v. Springer*, 51 F.3d 861, 864 (9th Cir. 1995). Whether a defendant has been denied the right to a public trial is reviewed de novo. *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003).

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. *See* *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005); *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir. 1994). Whether those words actually invoked the right to counsel is reviewed de novo. *See* *Younger*, 398 F.3d at 1185; *Ogbuehi*, 18 F.3d at 812.

Whether a trial court's suppression of a defendant's testimony violates the Sixth Amendment right to testify is reviewed de novo. *See* *United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996).

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. *See* *United States v. Lindsey*, 634 F.3d 541, 554 (9th Cir. 2011); *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005); *United States v. McKenna*, 327 F.3d 830, 843 (9th Cir. 2003); *United States v. Smith*, 282 F.3d 758, 763 (9th Cir. 2002); *United States v. Corona-Garcia*, 210 F.3d 973, 976 (9th Cir. 2000).

A district court's decision at a revocation hearing to deny defendant's request for substitute counsel is reviewed for an abuse of discretion. *See* *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000). Whether a

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[25] *See, e.g.*, *United States v. Ortega*, 203 F.3d 675, 679 (9th Cir. 2000) (direct appeal); *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995) (coram nobis); *United States v. Benlian*, 63 F.3d 824, 826 (9th Cir. 1995) (ineffective assistance of counsel claim).

defendant has a Sixth Amendment right to counsel in a civil forfeiture proceeding is reviewed de novo. *See United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995).

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *See United States v. Matus-Zayas*, 655 F.3d 1092, 1098 (9th Cir. 2011); *United States v. Norwood*, 603 F.3d 1063, 1067 (9th Cir. 2010); *Lilly v. Virginia*, 527 U.S. 116, 136-37 (1999); *United States v. Ballesteros-Selinger*, 454 F.3d 973, 974 n.2 (9th Cir. 2006); *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004); *United States v. Murillo*, 288 F.3d 1126, 1137 (9th Cir. 2002); *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000).[26]

Prior to *United States v. Larson*, 495 F.3d 1094, 1100 (9th Cir. 2007), there was "an intra-circuit conflict regarding the standard of review for Confrontation Clause challenges to a trial court's limitations on cross-examination." One line of cases applied de novo review, a second line applied abuse of discretion, and a third line of cases combined the two approaches. *See id.* at 1100-01.[27] *Larson* resolved the conflict, holding that "[i]f the defendant raises a Confrontation Clause challenge based on the exclusion of an area of inquiry, [the court] reviews de novo. … A challenge to a trial court's restrictions on the manner or scope of cross-examination on nonconstitutional grounds is [] reviewed for abuse of discretion." *Id.* at 1101.

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[26] *See also Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998) (tribal court); *Paradis v. Arave*, 20 F.3d 950, 956 (9th Cir. 1994) (habeas).

[27] *Compare United States v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002) (applying de novo review); *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000) (same); *United States v. James*, 139 F.3d 709, 713 (9th Cir. 1998) (same); *with United States v. Lo*, 231 F.3d 471, 482 (9th Cir. 2000) (applying abuse of discretion standard); *with United States v. Shryock*, 342 F.3d 948, 979 (9th Cir. 2003); *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999) (noting that de novo review applies to determination of whether limitations on cross-examination violated right to confrontation but that "[t]he district court, however, has considerable discretion in restricting cross-examination, and this court will find error only when that discretion has been abused.").

Confrontation Clause violations are subject, however, to harmless error analysis. *See* *Nielsen*, 371 F.3d at 581; *Shryock*, 342 F.3d at 979; *Ortega*, 203 F.3d at 682; *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999).[28]

The court reviews de novo whether there has been a violation of the Sixth Amendment right to make a defense. *See* *United States v. Stever*, 603 F.3d 747, 752 (9th Cir. 2010); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 930 n.7 (9th Cir. 2009).

56. Speedy Trial

A district court's decision whether to dismiss an indictment for violation of the constitutional right to a speedy trial is reviewed de novo. *See* *United States v. Gregory*, 322 F.3d 1157, 1160-61 (9th Cir. 2003); *United States v. Lam*, 251 F.3d 852, 855 (9th Cir.), *amended by* 262 F.3d 1033 (9th Cir. 2001). A finding of prejudice is reviewed under the clearly erroneous standard. *See* *Gregory*, 322 F.3d at 1161; *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998).

The district court's application of the Speedy Trial Act is reviewed de novo. *See* *United States v. Medina*, 524 F.3d 974, 982 (9th Cir. 2008); *United States v. King*, 483 F.3d 969, 972 n.3 (9th Cir. 2007); *United States v. Vo*, 413 F.3d 1010, 1014 n.1 (9th Cir. 2005); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1084 (9th Cir. 2004); *United States v. Pitner*, 307 F.3d 1178, 1182 (9th Cir. 2002); *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000); *United States v. Hall*, 181 F.3d 1057, 1061 (9th Cir. 1999) (noting that questions of law under the Speedy Trial Act reviewed de novo). The court's interpretation of the Speedy Trial Act is also reviewed de novo. *See* *Medina*, 524 F.3d 982; *United States v. Boyd*, 214 F.3d 1052, 1054 (9th Cir. 2000); *United States v. Ortiz-Lopez*, 24 F.3d 53, 54 (9th Cir. 1994).

The district court's factual findings under the Speedy Trial Act are reviewed for clear error. *See* *King*, 483 F.3d at 972 n.3; *Vo*, 413 F.3d at 1014 n.1; *Martinez-Martinez*, 369 F.3d at 1084; *United States v. Contreras*,

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[28] *See also* *Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); *Whelchel v. Washington*, 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas).

63 F.3d 852, 855 (9th Cir. 1995); *Ortiz-Lopez*, 24 F.3d at 54. A district court's finding of an "ends of justice" exception will be reversed only if there is clear error. *See Ramirez-Cortez*, 213 F.3d at 1153; *United States v. Paschall*, 988 F.2d 972, 974 (9th Cir. 1993); *United States v. Murray*, 771 F.2d 1324, 1327 (9th Cir. 1985). A judge may revoke a time extension made in the same case by another judge. The revocation will be upheld only if the second judge specifically determines that the fact findings of the judge granting the continuance were clearly in error. *See Murray*, 771 F.2d at 1327.

The district court's decision on a motion to dismiss for noncompliance with the Speedy Trial Act is reviewed de novo. *See United States v. Daychild*, 357 F.3d 1082, 1089 n.5 (9th Cir. 2004); *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002); *Pitner*, 307 F.3d at 1182; *United States v. Symington*, 195 F.3d 1080, 1090-91 (9th Cir. 1999); *United States v. Pena-Carrillo*, 46 F.3d 879, 882 (9th Cir. 1995). To dismiss *without* prejudice for a Speedy Trial Act violation, the district court shall make factual findings and apply them to the relevant statutory factors; otherwise, dismissal shall be entered *with* prejudice. *See United States v. Delgado-Miranda*, 951 F.2d 1063, 1064-65 (9th Cir. 1991) (per curiam); *but see United States v. Clymer*, 25 F.3d 824, 831 (9th Cir. 1994) (reviewing court has discretion on appeal to decide whether to dismiss indictment with or without prejudice if all relevant facts have been presented).

Whether a juvenile's speedy trial rights were violated is reviewed de novo. *See United States v. C.M.*, 485 F.3d 492, 498 (9th Cir. 2007); *United States v. Juvenile (RRA-A)*, 229 F.3d 737, 742 (9th Cir. 2000) (applying Juvenile Delinquency Act); *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998); *United States v. Eric B.*, 86 F.3d 869, 872 (9th Cir. 1996).

Whether a defendant was brought to trial within the speedy trial period of the Interstate Agreement on Detainers Act is a question of law reviewed de novo. *See United States v. Collins*, 90 F.3d 1420, 1425 (9th Cir. 1996).

Note that a trial court's decision on a defendant's motion to dismiss charges for *preindictment delay* is reviewed for an abuse of discretion. *See United States v. DeGeorge*, 380 F.3d 1203, 1210 (9th Cir. 2004); *United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003); *United States v. Doe*, 149 F.3d 945, 947 (9th Cir. 1998). The denial of a motion to dismiss

based on *preaccusation delay* is reviewed for an abuse of discretion. *See* *Doe*, 149 F.3d at 947.

57. Statutes

The construction or interpretation of a statute is reviewed de novo. *See* *United States v. Begay*, 622 F.3d 1187, 1193 (9th Cir. 2010); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 495 (9th Cir. 2007); *United States v. Norbury*, 492 F.3d 1012, 1014 (9th Cir. 2007); *United States v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc). Specific statutes follow.

- Sentencing (statutes & guidelines). *See, e.g.*, *Gamboa-Cardenas*, 508 F.3d at 495; *United States v. Leon H.*, 365 F.3d 750, 752 (9th Cir. 2004); *United States v. Auld*, 321 F.3d 861, 863 (9th Cir. 2003); *United States v. Kakatin*, 214 F.3d 1049, 1051 (9th Cir. 2000); *United States v. Hunter*, 101 F.3d 82, 84 (9th Cir. 1996).
- State law. *See, e.g.*, *United States v. Davidson*, 246 F.3d 1240, 1246 (9th Cir. 2001) (California); *United States v. Ramos*, 39 F.3d 219, 220 (9th Cir. 1994) (Arizona).
- Specific statutes & phrases. *See, e.g.*, *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011) (SDWA); *United States v. One Sentinel Arms Striker-12 Shotgun Serial No. 001725*, 416 F.3d 977, 979 (9th Cir. 2005) ("destructive device"); *United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1133 (9th Cir. 2005) (contraband); *United States v. Kranovich*, 401 F.3d 1107, 1111 (9th Cir. 2005) (theft involving federal funds/programs); *United States v. Shipsey*, 363 F.3d 962, 968 n.4 (9th Cir. 2004) (statute of limitation); *Cabaccang*, 332 F.3d at 624-25 (importation); *United States v. Migi*, 329 F.3d 1085, 1087 (9th Cir. 2003) (playground); *United States v. Lincoln*, 277 F.3d 1112, 1113 (9th Cir. 2002) (MVRA); *United States v. Kaluna*, 192 F.3d 1188, 1193 (9th Cir. 1999) (en banc) (three-strikes law); *United States v. Frega*, 179 F.3d 793, 802 n.6 (9th Cir. 1999) (mail fraud); *United States v. Doe*, 136 F.3d 631, 634 (9th Cir. 1998) (arson); *United States v. DeLaCorte*, 113 F.3d 154, 155 (9th Cir. 1997) (carjacking); *United States v. Salemo*, 81 F.3d 1453, 1457 (9th Cir. 1996) (Criminal Justice Act); *United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir. 1996) (Omnibus Crime Control and Safe Streets

Act); *United States v. Bailey*, 41 F.3d 413, 416 (9th Cir. 1994) ("access device").

The applicability of a statute to a particular case is a question of law reviewed de novo. *See United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (AEDPA).

The constitutionality of a statute is a question of law reviewed de novo. *See United States v. Perelman*, 658 F.3d 1134, 1134 (9th Cir. 2011); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007); *United States v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007); *United States v. Strong*, 489 F.3d 1055, 1060 (9th Cir. 2007); *United States v. Jensen*, 425 F.3d 698, 706-07 (9th Cir. 2005); *see also United States v. $129,727.00 U.S. Currency*, 129 F.3d 486, 491 (9th Cir. 1997) (civil forfeiture).

Whether a statute is void for vagueness is a question of law reviewed de novo. *See United States v. Shetler*, 665 F.3d 1150, 1164 (9th Cir. 2011); *United States v. Hungerford*, 465 F.3d 1113, 1116 (9th Cir. 2006); *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004); *United States v. Naghani*, 361 F.3d 1255, 1259 (9th Cir. 2004); *United States v. Cooper*, 173 F.3d 1192, 1202 (9th Cir. 1999).

Whether a statute violates a defendant's right to due process is reviewed de novo. *See United States v. Hill*, 279 F.3d 731, 736 (9th Cir. 2002); *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999). A district court's refusal to dismiss an indictment based on its interpretation of a federal statute is reviewed de novo. *See United States v. Akins*, 276 F.3d 1141, 1146 (9th Cir. 2002), *abrogated in part on other grounds by Iowa v. Tovar*, 541 U.S. 77 (2007).

58. Statutes of Limitation

The district court's conclusion that a particular statute of limitation applies is reviewed de novo. *See United States v. Leo Sure Chief*, 438 F.3d 920, 922 (9th Cir. 2006).[29] When a statute of limitation began to run is also

[29] *See also United States v. Shipsey*, 363 F.3d 962, 968 n.4 (9th Cir. 2004).

a question of law reviewed de novo. *See* *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 780 (9th Cir. 2002).[30]

59. Suppression

Motions to suppress are reviewed de novo and the trial court's factual findings are reviewed for clear error. *See* *United States v. Giberson*, 527 F.3d 882, 886 (9th Cir. 2008); *United States v. Aukai*, 497 F.3d 955, 958 (9th Cir. 2007).

Whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. *See* *United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1162 (9th Cir. 2007); *United States v. Hernandez*, 424 F.3d 1056, 1058 (9th Cir. 2005).[31] Whether to grant or deny a motion to continue a suppression hearing is reviewed for an abuse of discretion. *See* *United States v. Mejia*, 69 F.3d 309, 314 (9th Cir. 1995) (listing factors).

Whether to reconsider a suppression order at trial is reviewed for abuse of discretion. *See* *United States v. Buffington*, 815 F.2d 1292, 1298 (9th Cir. 1987). The district court's denial of a motion to reconsider and to reopen a suppression hearing is reviewed for an abuse of discretion. *See* *United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

60. Transfer of Trial

The district court's denial of a motion to transfer trial pursuant to Fed. R. Crim. P. 18 is reviewed for an abuse of discretion. *See* *United States v. Scholl*, 166 F.3d 964, 969 (9th Cir. 1999).

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[30] *See also* *Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1127 (9th Cir. 2006) ("We review de novo the question of when a cause of action accrues and whether a claim is barred by the statute of limitations.").

[31] *See also* *United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000) ("An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist.").

61. Venue

In criminal cases, venue is a question of law reviewed de novo. *See* *United States v. Stinson*, 647 F.3d 1196, 1204 (9th Cir. 2011);*United States v. Valdez-Santos*, 457 F.3d 1044, 1046 (9th Cir. 2006) (reversing district court). The trial court's denial of a motion for change of venue, however, is reviewed for an abuse of discretion. *See* *Stinson*, 647 F.3d at 1204; *Valdez-Santos*, 457 F.3d at 1046; *United States v. Croft*, 124 F.3d 1109, 1115 n.2 (9th Cir. 1997); *United States v. Collins*, 109 F.3d 1413, 1416 (9th Cir. 1997).

62. Vindictive Prosecution

The district court's decision whether to dismiss an indictment for vindictive prosecution is a mixed question of law and fact reviewed de novo. *See* *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007).

63. Voluntariness of a Confession

See II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 6. Confessions.

64. Waiver of Rights

Issues of waiver generally are reviewed de novo. *See* *United States v. Pacheco-Navarette*, 432 F.3d 967, 970 (9th Cir. 2005) (appeal waivers). "Whether [a] waiver was knowing and intelligent is a question of fact that we review for clear error." *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1127 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005); (*Miranda* waiver); *see also* *United States v. Shi*, 525 F.3d 709, 728 (9th Cir. 2008) (*Miranda* waiver); *but see* *United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir. 2000) ("Whether a particular waiver was made 'knowing and voluntarily' is a determination we make de novo."). "Whether the waiver was voluntary is a mixed question of fact and law, which we review de novo." *United States v. Amano*, 229 F.3d 801, 803 (9th Cir. 2000) (*Miranda* waiver).[32]

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[32] *See, e.g.*, *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005) (*Miranda* waiver); *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007); *United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999)

65. Warrants

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See* *United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011); *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006).[33] The magistrate judge's determination of probable cause is accorded deference by the reviewing court. *See* *Hill*, 459 F.3d at 970 ("great deference"); *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004) ("great deference"); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) ("significant deference).

Whether a warrant is sufficiently specific is reviewed de novo. *See* *United States v. Adjani*, 452 F.3d 1140, 1143 (9th Cir. 2006).[34] The scope of a warrant is a question of law reviewed de novo. *See* *United States v. Hurd*, 499 F.3d 963, 965 (9th Cir. 2007).[35] Whether an area is within the protected

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(waiver of attorney-client privilege); *United States v. Aguilar-Muniz*, 156 F.3d 974, 976 (9th Cir. 1998) (right to appeal); *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997) (waiver of jury trial); *United States v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996) (privilege against self-incrimination); *United States v. Reyes*, 8 F.3d 1379, 1383 (9th Cir. 1993) (waiver of jury trial by jury over government objection); *but see* *United States v. Lumitap*, 111 F.3d 81, 83 (9th Cir. 1997) (district court's denial of a defendant's motion to waive presence at trial reviewed for abuse of discretion).

[33] *See also* *United States v. Reeves*, 210 F.3d 1041, 1046 (9th Cir. 2000); *United States v. Wong*, 334 F.3d 831, 835-36 (9th Cir. 2003); *United States v. Celestine*, 324 F.3d 1095, 1000 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 963 n.6 (9th Cir. 2000); *United States v. Hernandez*, 937 F.2d 1490, 1494 (9th Cir. 1991) (the standard of review is "less probing than de novo review and shows deference to the issuing magistrate's determination.").

[34] *See also* *United States v. Barajas-Avalos*, 377 F.3d 1040, 1058 (9th Cir. 2004) (legal sufficiency of a redacted affidavit); *United States v. Noushfar*, 78 F.3d 1442, 1447 (9th Cir. 1996), *amended by* 140 F.3d 1244 (9th Cir. 1998).

[35] *See also* *United States v. Hitchcock*, 286 F.3d 1064, 1071 (9th Cir. 2002), *amended and superseded by* 298 F.3d 1021 (9th Cir. 2002); *United States v. Cannon*, 264 F.3d 875, 878 (9th Cir. 2001); *United States v. Gorman*, 104 F.3d 272, 274 (9th Cir. 1996).

curtilage of a home is reviewed de novo. *See* *United States v. Davis*, 530 F.3d 1069, 1077 (9th Cir. 2008); *United States v. Barajas-Avalos*, 377 F.3d 1040, 1054 (9th Cir. 2004).[36]

Whether the good faith exception to the exclusionary rule applies in any given case is subject to de novo review. *United States v. Kurt*, 986 F.2d 309, 311 (9th Cir. 1993); *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1282 (9th Cir. 1992); *see also* *United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 1994) (good faith reliance on a warrant not supported by probable cause).

66. Wiretaps

A district court's authorization of a wiretap is reviewed for an abuse of discretion. *See* *United States v. Canales Gomez*, 358 F.3d 1221, 1225 (9th Cir. 2004).[37] However, the court reviews de novo whether the requisite full and complete statement of facts was submitted in compliance with 18 U.S.C. § 2518(1)(c). *See* *Canales Gomez*, 358 F.3d at 1224; *United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003).[38] Whether other investigative procedures have been exhausted or why they reasonably appear not likely to succeed is also reviewed de novo. *See* *United States v. Lynch*, 367 F.3d 1148, 1159 (9th Cir. 2004) (but noting that ultimate conclusion that a wiretap is necessary is reviewed for an abuse of discretion).

The court's decision to deny a motion to suppress wiretap evidence is reviewed de novo. *See* *Lynch*, 367 F.3d at 1159 (reviewing denial of suppression motion); *United States v. Reyna*, 218 F.3d 1108, 1110 (9th Cir. 2000) (same). The ultimate question whether a false statement or omission

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[36] *See also* *United States v. Johnson*, 256 F.3d 895, 909 n.1 (9th Cir. 2001) (en banc) (overruling prior cases that applied clear error standard); *but see* *United States v. Romero-Bustamente*, 337 F.3d 1104, 1107-08 n.2 (9th Cir. 2003) (questioning *Johnson*'s precedential value on the standard of review).

[37] *See also* *United States v. McGuire*, 307 F.3d 1192, 1197 (9th Cir. 2002); *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001); *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1395 (9th Cir. 1990); *United States v. Carneiro*, 861 F.2d 1171, 1177 (9th Cir. 1988).

[38] *See also* *McGuire*, 307 F.3d at 1197; *Blackmon*, 273 F.3d at 1207; *United States v. Khan*, 993 F.2d 1368, 1375 (9th Cir. 1993); *Carneiro*, 861 F.2d at 1176.

is necessary to a finding of probable cause is a mixed question of law and fact reviewed de novo. *See* *United States v. Tham*, 960 F.2d 1391, 1395 (9th Cir. 1992). This court reviews de novo a district court's denial of a *Franks* hearing challenging the veracity of an affidavit supporting a wiretap application. *See* *Shryock*, 342 F.3d at 975; *United States v. Meling*, 47 F.3d 1546, 1553 (9th Cir. 1995). The district court's underlying factual determinations are reviewed for clear error. *See* *Shryock*, 342 F.3d at 975; *Tham*, 960 F.2d at 1395.

A trial court's decision to allow use of wiretap transcripts during trial and to permit such exhibits in the jury room is reviewed for an abuse of discretion. *See* *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999); *United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir. 1995).

C. Trial Decisions in Criminal Cases

1. Acquittals

A trial court's ruling on a motion for acquittal is reviewed de novo. *See* *United States v. Sanchez*, 639 F.3d 1201, 1203 (9th Cir. 2011); *United States v. Sutcliffe*, 505 F.3d 944, 959 (9th Cir. 2007).[39] This court reviews evidence presented against the defendant in a light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[40] *See* *United States v. Mincoff*, 574 F.3d 1186, 1191-92 (9th Cir. 2009); *see also* *United States v. Yoshida*, 303 F.3d 1145, 1149 (9th Cir. 2002) (noting standard and explaining deference owed to jury); *United States v. Magallon-Jimenez*, 219 F.3d 1109, 1112 (9th Cir. 2000) (noting standard applies also to bench trials).

The denial of a motion for judgment of acquittal based on the untimeliness of the motion involves factual findings reviewed under the

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[39] *See also* *United States v. Dearing*, 504 F.3d 897, 900 (9th Cir. 2007); *United States v. Atalig*, 502 F.3d 1063, 1066 (9th Cir. 2007); *United States v. Johnson*, 357 F.3d 980, 983 (9th Cir. 2004); *United States v. Somsamouth*, 352 F.3d 1271, 1274 (9th Cir. 2003).

[40] *See* *United States v. Sutcliffe*, 505 F.3d 944, 959 (9th Cir. 2007); *Dearing*, 504 F.3d at 900; *Atalig*, 502 F.3d at 1066; *Somsamouth*, 352 F.3d at 1274-75.

clearly erroneous standard. *See* *United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993); *United States v. Stauffer*, 922 F.2d 508, 516 (9th Cir. 1990).

When a defendant fails to move for acquittal during trial, review is limited to plain error. *See* *United States v. Ross*, 338 F.3d 1054, 1057 (9th Cir. 2003). Similarly, when a defendant fails to renew a motion for judgment of acquittal at the close of all evidence in a jury trial, this court reviews only for plain error to prevent a miscarriage of justice. *See* *United States v. Pelisamen*, 641 F.3d 399, 408-09 n.6 (9th Cir. 2011); *United States v. Lowry*, 512 F.3d 1194, 1198 n.3 (9th Cir. 2008); *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1224 (9th Cir. 2007); *United States v. Yossunthorn*, 167 F.3d 1267, 1270 n.4 (9th Cir. 1999) (explaining how defendant may preserve de novo review). No such motion is required, however, in a bench trial to preserve for appeal a challenge to the sufficiency of the evidence. *See* *United States v. Atkinson*, 990 F.2d 501, 503 (9th Cir. 1993) (en banc). When a claim of sufficiency of the evidence is preserved by a motion for acquittal at the close of the evidence, the appellate court reviews the district court's denial of the motion de novo. *See* *United States v. Dann*, 652 F.3d 1160, 1168 (9th Cir. 2006); *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002).

2. Admission of Evidence

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See* *United States v. Santini*, 656 F.3d 1075, 1077 (9th Cir. 2011) (per curiam); *United States v. Cherer*, 513 F.3d 1150, 1157 (9th Cir. 2007).[41] Such rulings will be reversed for an abuse of discretion only if such nonconstitutional error more likely than not affected the verdict. *See* *United States v. Edwards*, 235 F.3d 1173, 1178 (9th Cir. 2000); *United States v. Ramirez*, 176 F.3d 1179, 1182 (9th Cir. 1999); *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc); *see also* *United States v. Berber-Tinoco*, 510 F.3d 1083, 1092 (9th Cir. 2007) ("We need not reverse a district court's decision so long as we have a fair assurance that the

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[41] *See* *United States v. Cohen*, 510 F.3d 1114, 1123 (9th Cir. 2007) (Rule 702 and 704(b)); *United States v. Salcido*, 506 F.3d 729, 732 (9th Cir. 2007) (per curiam) (Rule 901); *United States v. Moran*, 493 F.3d 1002, 1012 (9th Cir. 2007) (Rule 403); *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1062 (9th Cir. 2004) (Rule 404(b)).

verdict was not substantially swayed by error.") (quotation marks omitted). The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is also reviewed for an abuse of discretion. *See* *United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992).

The district court's construction or interpretation of the Federal Rules of Evidence is a question of law subject to de novo review. *See* *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011); *United States v. W.R. Grace*, 504 F.3d 745, 758-59 (9th Cir. 2007).[42] Whether particular evidence falls within the scope of a rule of evidence is also reviewed de novo. *See* *United States v. Garrido*, 596 F.3d 613, 616 (9th Cir. 2010); *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006); *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003).

Questions of the admissibility of evidence that involve factual determinations, rather than questions of law, are reviewed for an abuse of discretion. *See* *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000).[43] When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. If an "essentially factual" inquiry is present, or if the exercise of the district court's discretion is determinative, then deference is given to the decision of the district court; otherwise, review is de novo. *See* *Mateo-Mendez*, 215 F.3d at 1042; *United States v. Marbella*, 73 F.3d 1508, 1515 (9th Cir. 1996).[44]

3. *Allen* Charges

See II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 41. Jury Instructions, b. Adequacy of Instructions, i. *Allen* Charges.

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[42] *See also* *United States v. Yida*, 498 F.3d 945, 949 (9th Cir. 2007); *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006).

[43] *See also* *United States v. Murphy*, 65 F.3d 758, 761 (9th Cir. 1995); *United States v. Wood*, 943 F.2d 1048, 1055 n.9 (9th Cir. 1991).

[44] *See also* *United States v. James*, 169 F.3d 1210, 1214 (9th Cir. 1999) (en banc) (noting review of discretionary evidentiary rulings is abuse of discretion); *United States v. Thompson*, 37 F.3d 450, 452 (9th Cir. 1994) (evidentiary ruling that raises predominantly legal question is reviewed de novo).

4. Authenticity

A trial court's decision regarding the authenticity of evidence is reviewed for an abuse of discretion. *See* *United States v. Weiland*, 420 F.3d 1062, 1072 n.6 (9th Cir. 2005); *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996). Authentication of evidence is satisfied by evidence "sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a).[45] The trial court's conclusion that evidence is supported by a proper foundation is also reviewed for an abuse of discretion. *See* *United States v. Pang*, 362 F.3d 1187, 1191 (9th Cir. 2004); *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000).

5. *Batson* Claims

Whether a district court is obligated to apply the *Batson* analysis to a defendant's claim of purposeful discrimination is a question of law reviewed de novo. *See* *United States v. Alanis*, 335 F.3d 965, 967 & n.1 (9th Cir. 2003). Whether a particular jury satisfies the "representative jury" required by *Batson* is reviewed de novo. *See* *United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992), *overruled on other grounds by United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010).[46] Whether a prosecutor's proclaimed reason for exercising a peremptory challenge is an adequate race-neutral explanation is an issue of law reviewed de novo. *See* *United States v. Mitchell*, 502 F.3d 931, 957 (9th Cir. 2007).[47] When defense counsel fails to preserve a *Batson* claim, review is limited to plain error. *See* *United States v. Contreras-Contreras*, 83 F.3d 1103, 1105 (9th Cir. 1996). Note that the court has implied "that an objection must be made in order to preserve a *Batson* claim in a habeas case." *Haney v. Adams*, 641 F.3d 1168, 1171 n.5 (9th Cir. 2011).

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[45] *See also* *United States v. Panaro*, 266 F.3d 939, 951 (9th Cir. 2001) (reciting standard); *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (same).

[46] *See also* *Cooperwood v. Cambra*, 245 F.3d 1042, 1047 (9th Cir. 2001) (habeas) (reviewing de novo the state court's ruling on the *Batson* prima facie issue).

[47] *See also* *Williams v. Rhoades*, 354 F.3d 1101, 1107 (9th Cir. 2004) (habeas) (reviewing de novo the facial validity of prosecutor's proffered reasons).

Where the district court erroneously denies a peremptory challenge, the court applies "the standard of review that is appropriate under the circumstances of the district court's error." *United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011) (reviewing for plain error where defendant failed to object to district judge's miscounting of peremptory challenges).

The district court's findings of fact as to the racially discriminatory use of peremptory challenges are reviewed for clear error. *See Mitchell*, 502 F.3d at 956.[48]

The trial court's remedy for a *Batson* violation is reviewed for an abuse of discretion. *See United States v. Ramirez-Martinez*, 273 F.3d 903, 910 (9th Cir. 2001), *overruled in part on other grounds by United States v. Lopez*, 484 F.3d 1186, 1191 (9th Cir. 2007) (en banc).

6. Best Evidence Rule

The best evidence rule provides that the original of a "writing, recording, or photograph" is required to prove the contents thereof. Fed. R. Evid. 1002. A district court's ruling on the best evidence rule is reviewed for an abuse of discretion. *See United States v. Bennett*, 363 F.3d 947, 952 (9th Cir. 2004).

7. *Bruton* Violations

An alleged *Bruton* violation is reviewed de novo. *See United States v. Mitchell*, 502 F.3d 931, 956 (9th Cir. 2007). When there is no objection at trial, review is limited to plain error. *See United States v. Arias-Villanueva*, 998 F.2d 1491, 1507 (9th Cir. 1993), *overruled in part on other grounds as stated in United States v. Jimenez-Ortega*, 472 F.3d 1102, 1103 (9th Cir. 2007) (per curiam).

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[48] *See also United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002) (noting whether defendant has made a prima facie showing of racial discrimination is reviewed for clear error); *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1218 (9th Cir. 2001) (same); *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir. 1999) ("The district court's determination on intent to discriminate is reviewed under a deferential standard.").

8. Burden of Proof

Whether a district court properly applied the correct burden of proof is a question of law reviewed de novo. *See* *United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States v. Banuelos*, 322 F.3d 700, 704 (9th Cir. 2003) (sentencing). Whether the court improperly shifted the burden of proof is reviewed de novo. *See* *United States v. Brobst*, 558 F.3d 982, 998 (9th Cir. 2009); *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001). The trial court's determination that a defendant has the burden of proving a defense is reviewed de novo. *See* *United States v. Beasley*, 346 F.3d 930, 933 (9th Cir. 2003).[49] The trial court's allocation of the burden of proof is also reviewed de novo. *See* *United States v. Pisello*, 877 F.2d 762, 764 (9th Cir. 1989); *see also* *United States v. Phelps*, 955 F.2d 1258, 1266 (9th Cir. 1992) (denial of release).

9. Chain of Custody

The trial court's ruling on a chain-of-custody challenge to evidence is reviewed for an abuse of discretion. *See* *United States v. Matta-Ballesteros*, 71 F.3d 754, 768 (9th Cir. 1995), *amended by* 98 F.3d 1100 (9th Cir. 1996).

10. Character Evidence

The trial court's decision to admit character evidence is reviewed for an abuse of discretion. *See* *United States v. Geston*, 299 F.3d 1130, 1137-38 (9th Cir. 2002).[50] If no objection was raised, the court's decision to admit the evidence is reviewed for plain error. *See* *United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002); *United States v. Bracy*, 67 F.3d 1421, 1432 (9th Cir. 1995). Whether particular evidence falls within the scope of Rule 404 is reviewed de novo. *See* *United States v. Rizk*, 660 F.3d 1125, 1131 (9th Cir. 2011); *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006); *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003); *United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002).

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[49] *See also* *United States v. Hernandez-Franco*, 189 F.3d 1151, 1157 (9th Cir. 1999); *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998).

[50] *See also* *United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002); *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999); *United States v. Bracy*, 67 F.3d 1421, 1432 (9th Cir. 1995).

11. Closing Arguments

The district court's decision to allow a jury to consider comments made in closing argument is reviewed for an abuse of discretion. *See* *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001).[51] Any improper comments are subject to harmless error review. *See* *United States v. Brown*, 327 F.3d 867, 871 (9th Cir. 2003).[52] The plain error standard applies when there is no objection. *See Brown*, 327 F.3d at 871; *Tam*, 240 F.3d at 802.[53]

Note that prosecutors are forbidden from commenting on a defendant's silence. *See* *Griffin v. California*, 380 U.S. 609, 615 (1985); *United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996). Claimed violations are reviewed de novo. *See* *United States v. Norwood*, 603 F.3d 1063, 1068 (9th Cir. 2010); *United States v. Lopez*, 500 F.3d 840, 844 (9th Cir. 2007); *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001) (applying harmless error standard). When there is no objection, review is limited to plain error. *See* *United States v. Sanchez*, 659 F.3d 1252, 1256 (9th Cir. 2011); *United States v. Amlani*, 111 F.3d 705, 714 (9th Cir. 1997).

The district court's decision to allow supplemental closing arguments is reviewed for abuse of discretion. *See* *United States v. Della Porta*, 653 F.3d 1043, 1047 (9th Cir. 2011). "Under this standard, the district judge's discretion should be preserved unless its exercise could deprive the defendant of a constitutional right or otherwise prejudice defendant's case." *Id.* (citations and internal quotation marks omitted) (relying on *United States v. Evanston*, 651 F.3d 1080, 1083-84 (9th Cir. 2011)).

12. Coconspirator Statements

A trial court's decision to admit coconspirator statements is reviewed for an abuse of discretion, while its underlying factual determinations that a

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[51] *See also* *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999); *United States v. Etsitty*, 130 F.3d 420, 424 (9th Cir. 1997) (per curiam), *amended by* 140 F.3d 1274 (9th Cir. 1998).

[52] *See also* *United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002) (per curiam); *United States v. Senchenko*, 133 F.3d 1153, 1156 (9th Cir. 1998).

[53] *See also* *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *Cooper*, 173 F.3d at 1203.

conspiracy existed and that the statements were made in furtherance of that conspiracy are reviewed for clear error. *See* *United States v. Moran*, 493 F.3d 1002, 1010 (9th Cir. 2007).[54] In *United States v. Pena-Espinoza*, 47 F.3d 356, 360-61 (9th Cir. 1995), however, this court stated that "[w]e review de novo the legal question of whether the government established a prima facie showing of conspiracy but apply a clearly erroneous standard in reviewing whether a challenged statement was made in the course and furtherance of the conspiracy." The court noted that "[t]he standard for reviewing the prima facie showing is . . . unsettled in this circuit." *Id.* at 361 n.3.

Prior to *Bourjaily v. United States*, 483 U.S. 171 (1987), this circuit reviewed de novo the district court's legal conclusion that a conspiracy existed. *See* *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988) (reviewing development of standard of review). In *Bourjaily*, the Supreme Court noted that the district court's factfinding regarding the existence of a conspiracy and the defendant's involvement in it was not clearly erroneous. *Bourjaily*, 483 U.S. at 181. After *Bourjaily*, this court has generally stated that it reviews for clear error the district court's findings that there was a conspiracy and that the statements were made in furtherance of the conspiracy. *See* *Moran*, 493 F.3d at 1010. Notwithstanding, some cases state that the circuit's standard of review is "unclear." *See* *Pena-Espinoza*, 47 F.3d at 361 n.3; *United States v. Castaneda*, 16 F.3d 1504, 1507 (9th Cir. 1994).

In some instances, this court has simply stated that "[w]e review for abuse of discretion the district court's decision to admit evidence of a co-conspirator's statement." *United States v. Garza*, 980 F.2d 546, 553 (9th Cir. 1992). This is the correct standard if review is limited to the trial court's discretionary decision to admit evidence. In *United States v. Peralta*, 941 F.2d 1003, 1006 (9th Cir. 1991), the court noted that the abuse of discretion standard applied to the trial court's decision to admit the statements but the trial court's underlying findings that there was a conspiracy and that the statements were made in furtherance of the conspiracy are reviewed for clear error. The correct standard is probably that this court reviews for abuse of discretion the district court's decision to

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[54] *See also* *United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 960 (9th Cir. 2000); *United States v. Gil*, 58 F.3d 1414, 1419 (9th Cir. 1995).

admit coconspirator statements and for clear error the underlying factual determinations that a conspiracy existed and that the statements were made in furtherance of that conspiracy. *See also* *Moran*, 493 F.3d at 1010; *United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003) (stating standard); *United States v. Segura-Gallegos*, 41 F.3d 1266, 1271 (9th Cir. 1994); *United States v. Arambula-Ruiz*, 987 F.2d 599, 607 (9th Cir. 1993). There remain some instances, however, where this court reviews de novo the trial court's conclusion regarding the existence of a conspiracy. *See* *United States v. Pena-Espinoza*, 47 F.3d at 360-61; *United States v. Vowiell*, 869 F.2d 1264, 1267 (9th Cir. 1989).

13. Comments on the Evidence

A trial court has discretion to comment on the evidence, as long as it makes clear that the jury must ultimately decide all questions of fact. *See* *United States v. Sager*, 227 F.3d 1138, 1145 (9th Cir. 2000); *People of Guam v. McGravey*, 14 F.3d 1344, 1348 (9th Cir. 1994). Whether a judge's comment on a defendant's decision not to testify violates the right against self-incrimination is reviewed de novo. *See* *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001).

A prosecutor's improper comments at closing argument are reviewed for harmless error. *See* *United States v. Brown*, 327 F.3d 867, 871 (9th Cir. 2003); *United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002) (per curiam); *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (vouching). The plain error standard applies when there is no objection. *See* *Brown*, 327 F.3d at 871.

14. Confrontation Clause

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *See* *United States v. Matus-Zayas*, 655 F.3d 1092, 1098 (9th Cir. 2011); *United States v. Norwood*, 603 F.3d 1063, 1067 (9th Cir. 2010); *Lilly v. Virginia*, 527 U.S. 116, 136-37 (1999).[55] However,

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[55] *See also* *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004); *United States v. Murillo*, 288 F.3d 1126, 1137 (9th Cir. 2002); *United States v. Boone*, 229 F.3d 1231, 1233 (9th Cir. 2000); *see also* *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998) (tribal court); *Paradis v. Arave*, 20 F.3d 950, 956 (9th Cir. 1994) (habeas).

where defendant fails "to object to the admission of evidence under the Confrontation Clause, [review is] for plain error." *See* *Matus-Zayas*, 655 F.3d at 1098 (internal quotation marks and citation omitted). Allegations that a district court violated the Confrontation Clause by excluding an area of inquiry on cross-examination are reviewed de novo. *See* *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc). However, the district court retains wide latitude to impose reasonable limits on the scope of questioning within a given area. *See* *id.* A non-constitutional challenge of a trial court's restriction on the manner and scope of cross examination is reviewed for abuse of discretion. *See* *id.* The caselaw was inconsistent prior to *Larson*. *See* *United States v. Rodriguez-Rodriguez*, 364 F.3d 1142, 1147 (9th Cir. 2004) (noting but not resolving conflict).

Confrontation Clause violations are subject to harmless error analysis. *See* *United States v. Orozco-Acosta*, 607 F.3d 1156, 1161 (9th Cir. 2010); *Larson*, 495 F.3d at 1107-08; *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004).[56]

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 55. Sixth Amendment Rights.

15. Constitutionality of Regulations

Whether a regulation is unconstitutional is a question of law reviewed de novo. *See* *United States v. Bohn*, 622 F.3d 1129, 1133 (9th Cir. 2010) (challenged as exceeding congressional authority); *United States v. Elias*, 269 F.3d 1003, 1014 (9th Cir. 2001) (vagueness).[57] Note that the district court's interpretation of a regulation is reviewed de novo. *See* *United States*

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[56] *See also* *United States v. Schoneberg*, 396 F.3d 1036, 1044 (9th Cir. 2004) (listing factors); *United States v. Orellana-Blanco*, 294 F.3d 1143, 1148 (9th Cir. 2002); *United States v Ortega*, 203 F.3d 675, 682 (9th Cir. 2000); *see also* *Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); *Whelchel v. Washington*, 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas).

[57] *See, e.g.*, *United States v. Erickson*, 75 F.3d 470, 475 (9th Cir. 1996) (vagueness, overbroadness and "prior restraint"); *United States v. Woodley*, 9 F.3d 774, 778 (9th Cir. 1993) (vagueness); *United States v. Coutchavlis*, 260 F.3d 1149, 1155 (9th Cir. 2001) (vagueness); *United States v. Albers*, 226 F.3d 989, 992 (9th Cir. 2000) (same).

v. Bibbins, 637 F.3d 1087, 1090 (9th Cir. 2011); *Bohn*, 622 F.3d at 1135; *United States v. Willfong*, 274 F.3d 1297, 1300 (9th Cir. 2001).[58] An agency's interpretation of regulations, however, is entitled to deference. *See United States v. McKittrick*, 142 F.3d 1170, 1173 (9th Cir. 1998).

16. Constitutionality of Statutes

The constitutionality of a statute is a question of law reviewed de novo. *See United States v. Perelman*, 658 F.3d 1134, 1134 (9th Cir. 2011); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007) (interstate threats).[59] The construction or interpretation of a statute is reviewed de novo. *See United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011) (Safe Drinking Water Act); *United States v. Li*, 643 F.3d 1183, 1185 (9th Cir. 2011); *United States v. Begay*, 622 F.3d 1187, 1193 (9th Cir. 2010).[60] The applicability of a statute to a particular case is a question of law reviewed de novo. *See United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (AEDPA).

17. Contempt

"The district court's decision to invoke summary contempt procedures, including its consideration of the need for immediate action, is reviewed for an abuse of discretion." *See United States v. Rrapi*, 175 F.3d 742, 753 (9th Cir. 1999); *United States v. Engstrom*, 16 F.3d 1006, 1009 (9th Cir. 1994); *but see United States v. Glass*, 361 F.3d 580, 587 (9th Cir.

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[58] *See also United States v. Albers*, 226 F.3d 989, 994 (9th Cir. 2000); *United States v. Ani*, 138 F.3d 390, 391 (9th Cir. 1998).

[59] *See also United States v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007) (supervised release condition); *United States v. Strong*, 489 F.3d 1055, 1060 (9th Cir. 2007) (mandatory government treatment); *United States v. Naghani*, 361 F.3d 1255, 1259 (9th Cir. 2004).

[60] *See also United States v. Norbury*, 492 F.3d 1012, 1014 (9th Cir. 2007); *United States v. Tapia-Romero*, 523 F.3d 1125, 1126 (9th Cir. 2008) (sentencing); *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008) (Bail Reform Act); *United States v. Macias-Valencia*, 510 F.3d 1012, 1013 (9th Cir. 2007) (DEA); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 495 (9th Cir. 2007) (sentencing); *United States v. Atalig*, 502 F.3d 1063, 1066 (9th Cir. 2007) (false claims); *United States v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc).

2004) (noting court "must independently evaluate the need for summary procedures"). The court's refusal to grant a mistrial after holding a defendant in criminal contempt is reviewed for an abuse of discretion. *See United States v. McCormac*, 309 F.3d 623, 626 (9th Cir. 2002).

A district court's findings of fact in support of a disciplinary order are reviewed for clear error. *See United States Dist. Court v. Sandlin*, 12 F.3d 861, 864-65 (9th Cir. 1993). The terms and conditions of a disciplinary order are reviewed for abuse of discretion. *See Engstrom*, 16 F.3d at 1011.

The legality of a sentence imposed for criminal contempt is reviewed de novo. *See United States v. Carpenter*, 91 F.3d 1282, 1283 (9th Cir. 1996) (per curiam), *implied overruling on other grounds recognized by United States v. Broussard*, 611 F.3d 1069 (9th Cir. 2010). Whether a magistrate judge has jurisdiction to impose criminal contempt sanctions is a question of law reviewed de novo. *See Bingman v. Ward*, 100 F.3d 653, 656 (9th Cir. 1996).

Civil contempt orders are reviewed for an abuse of discretion. *See SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir.), *amended by* 335 F.3d 834 (9th Cir. 2003); *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999).

18. Continuances

A trial court's ruling on a request for a continuance of trial is reviewed for an abuse of discretion. *See United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011); *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005).[61] The court's decision to grant or deny a motion for continuance made during trial is also reviewed for an abuse of discretion. *See United States v. Nguyen*, 88 F.3d 812, 819 (9th Cir. 1996); *United States v. Gonzalez-Rincon*, 36 F.3d 859, 865 (9th Cir. 1994). The decision to deny a motion for continuance made on the first day of trial is also reviewed for an abuse of discretion. *See United States v. Torres-Rodriguez*, 930 F.2d 1375, 1383 (9th Cir. 1991), *abrogated on other grounds by Bailey v. United States*, 516 U.S/ 137 (1995). A trial court's refusal to grant a continuance of a

[61] *See also United States v. Nguyen*, 262 F.3d 998, 1002 (9th Cir. 2001); *United States v. Zamora-Hernandez*, 222 F.3d 1046, 1049 (9th Cir. 2000); *United States v. Garrett*, 179 F.3d 1143, 1144-45 (9th Cir. 1999) (en banc).

sentencing hearing is reviewed for an abuse of discretion. *See* *United States v. Lewis*, 991 F.2d 524, 528 (9th Cir. 1993).

A trial court abuses its discretion only if its denial of a continuance was arbitrary or unreasonable. *See* *Wilkes*, 662 F.3d at 543; *United States v. Wills*, 88 F.3d 704, 711 (9th Cir. 1996). "To reverse a trial court's denial of a continuance, an appellant must show that the denial prejudiced [her] defense." *Gonzalez-Rincon*, 36 F.3d at 865 (internal quotation omitted); *see also* *Wilkes*, 662 F.3d at 543. "'Where the denial of a continuance prevents the introduction of specific evidence, the prejudice inquiry focuses on the significance of that evidence.'" *Id.* (quoting *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1142 (9th Cir. 2011)).

19. Credibility Determinations

A trial court's ruling on the credibility of a witness is entitled to deference and is reviewed for clear error. *See* *United States v. Stanley*, 653 F.3d 946, 952 (9th Cir. 2011).[62] Harmless error review applies when defendant objects at trial to alleged improper vouching. *See* *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002). Plain error review applies when defendant makes no objection to alleged improper vouching. *See* *United States v. Doss*, 630 F.3d 1181, 1193 (9th Cir. 2011); *United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001).[63] A district court commits plain error by allowing a prosecutor to persist in asking witnesses to comment upon the veracity of other witnesses. *See* *United States v. Geston*, 299 F.3d 1130, 1138 (9th Cir. 2002); *cf.* *United States v. Greer*, 640 F.3d 1011, 1023-24 (9th Cir. 2011) (distinguishing between asking whether another witness was "lying" or simply "mistaken").

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[62] *See also* *United States v. Cervantes*, 219 F.3d 882, 891 (9th Cir. 2000), *overruled in part on other grounds by* *Brigham City v. Stuart*, 547 U.S. 398, 402 (2006).

[63] *See also* *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Garcia-Guizar*, 160 F.3d 511, 521 (9th Cir. 1998); *United States v. Rudberg*, 122 F.3d 1199, 1206 (9th Cir. 1997).

20. Cross-Examination

A trial court's decisions regarding the scope of cross-examination is reviewed for abuse of discretion. *See* *United States v. Shryock*, 342 F.3d 948, 980 (9th Cir. 2003) (limiting cross-examination); *United States v. Senchenko*, 133 F.3d 1153, 1158-59 (9th Cir. 1998) (permitting cross-examination).[64] "The trial court does not abuse its discretion as long as the jury receives sufficient information to appraise the biases and motivations of the witnesses." *United States v. Manning*, 56 F.3d 1188, 1197 (9th Cir. 1995) (internal quotation omitted). The failure to object to questions posed during cross-examination limits review to plain error. *See* *United States v. Shwayder*, 312 F.3d 1109, 1120 (9th Cir. 2002), *amended by* 320 F.3d 889 (9th Cir. 2003); *United States v. Geston*, 299 F.3d 1130, 1135 (9th Cir. 2002).

Allegations that a district court violated the Confrontation Clause by excluding an area of inquiry on cross-examination are reviewed de novo. *See* *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc). However, the district court retains wide latitude to impose reasonable limits on the scope of questioning within a given area. *See* *id.* A non-constitutional challenge of a trial court's restriction on the manner and scope of cross examination is reviewed for abuse of discretion. *See* *id.* The caselaw was inconsistent prior to *Larson*. *See* *United States v. Rodriguez-Rodriguez*, 393 F.3d 849, 856 (9th Cir. 2005) (noting but not resolving conflict). Note that Confrontation Clause violations are subject to harmless error analysis. *See* *Larson*, 495 F.3d at 1107-08.

Whether a court's limitation on recross-examination constitutes a violation of the Confrontation Clause is also reviewed de novo. *See* *United States v. Baker*, 10 F.3d 1374, 1405 (9th Cir. 1993), *overruled in part on other grounds by* *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), *overruled in part by United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002); *United States v. Vargas*, 933 F.2d 701, 704 (9th Cir. 1991). Within the bounds of constitutionality, review of the court's limitations on recross is for an abuse of discretion. *See* *Baker*, 10 F.3d at 1405.

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[64] *See also* *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002); *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999).

In habeas review, a state trial court has "considerable discretion to limit cross-examination … ." *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (internal quotation omitted).

21. Documentary Evidence

A district court's ruling on the admission of documentary evidence is reviewed for abuse of discretion. *See United States v. Laurienti*, 611 F.3d 530, 550 (9th Cir. 2010) (charts and summaries); *United States v. Blitz*, 151 F.3d 1002, 1007 (9th Cir. 1998) (bank records).[65] The decision to seal documents is reviewed for an abuse of discretion. *See Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 n.3 (9th Cir. 2006) ("We review for abuse of discretion …the decision to unseal the judicial record."); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003).

22. Double Jeopardy

Double jeopardy claims are reviewed de novo. *See United States v. Castillo-Basa*, 483 F.3d 890, 895 (9th Cir. 2007); *United States v. Male Juvenile (Pierre Y.)*, 280 F.3d 1008, 1019 (9th Cir. 2002) (noting review applies to both statutory and constitutional claims).[66]

The district court's denial of a motion to dismiss on double jeopardy grounds is reviewed de novo. *See United States v. Lopez-Avila*, No. 11-

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[65] *See also United States v. Bachsian*, 4 F.3d 796, 799 (9th Cir. 1993) (shipping documents); *United States v. Hernandez*, 876 F.2d 774, 778 (9th Cir. 1989) (police reports); *United States v. Miller*, 874 F.2d 1255, 1275 (9th Cir. 1989) (classified documents); *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985) (confirmation sale slips).

[66] *See also United States v. Kuchinski*, 469 F.3d 853, 857 (9th Cir. 2006) (sentencing); *United States v. Patterson*, 381 F.3d 859, 863 (9th Cir. 2004) (plea agreement); *United States v. Radmall*, 340 F.3d 798, 800 n. 4 (9th Cir. 2003) (resentencing); *United States v. McClain*, 133 F.3d 1191, 1193 (9th Cir. 1998) (habeas); *United States v. Stoddard*, 111 F.3d 1450, 1454 (9th Cir. 1997) (conspiracy); *United States v. Seley*, 957 F.2d 717, 720 (9th Cir. 1992) (relationship of collateral estoppel to double jeopardy reviewed de novo); *United States v. Stauffer*, 922 F.2d 508, 513 (9th Cir. 1990) (whether trial court's correction of verdict form violates double jeopardy reviewed de novo).

10013, --- F.3d ---, 2012 WL 450314, at *6 (9th Cir. Feb. 14, 2012) (as amended); *Castillo-Basa*, 483 F.3d at 895; *United States v. Hickey*, 367 F.3d 888, 891 n.3 (9th Cir. 2004), *amended by* 400 F.3d 658 (9th Cir. 2005); *United States v. Ziskin*, 360 F.3d 934, 942-43 (9th Cir. 2003) (clarifying law).[67] Factual findings, including those on which denial may be based, are reviewed for clear error. *See Lopez-Avila*, 2012 WL 450314, at *6; *Ziskin*, 360 F.3d at 943. Note, however, that the district court's determination that the initial dismissal was required by "manifest necessity" is reviewed for an abuse of discretion. *See United States v. Bonas*, 344 F.3d 945, 948 (9th Cir. 2003) (explaining in n.3 that review is for an abuse of discretion even though "manifest necessity" is referred to as a finding). Also, a denial of a motion for a hearing on the issue of double jeopardy is reviewed for an abuse of discretion. *See United States v. Hernandez*, 80 F.3d 1253, 1261 (9th Cir. 1996), *overruled in part on other grounds as recognized by United States v. Foster*, 165 F.3d 689, 692 n.5 (9th Cir. 1999) (en banc).

"[T]he district court's dismissal of the indictment on the basis of double jeopardy" is reviewed de novo." *United States v. Carothers*, 630 F.3d 959, 963 (9th Cir. 2011).

Note there is a distinction between "objections to multiplicity in the indictment, which can be waived, and objections to multiplicitous sentences and convictions, which cannot be waived." *United States v. Zalapa*, 509 F.3d 1060, 1063 (9th Cir. 2007). Where the defendant fails to "'raise the issue of multiplicity of convictions and sentences before the district court, … review [of] the district court's decision [is] for plain error.'" *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1148 (9th Cir. 2012) (quoting *Zalapa*, 509 F.3d at 1064).

23. Entrapment

A defendant's entrapment argument is reviewed de novo. *See United States v. Sandoval-Mendoza*, 472 F.3d 645, 648 (9th Cir. 2006).[68] A trial court's decision to exclude evidence of an entrapment defense is also reviewed de novo. *See United States v. Batterjee*, 361 F.3d 1210, 1216 (9th

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[67] *See also United States v. Price*, 314 F.3d 417, 420 (9th Cir. 2002).

[68] *See also United States v. Si*, 343 F.3d 1116, 1125 (9th Cir. 2003); *United States v. Mendoza-Prado*, 314 F.3d 1099, 1102 (9th Cir. 2002); *United States v. Tucker*, 133 F.3d 1208, 1214 (9th Cir. 1998).

Cir. 2004).[69] Whether a jury instruction properly states the law of entrapment is a question of law subject to de novo review. *See United States v. LaRizza*, 72 F.3d 775, 778 (9th Cir. 1995).[70] Findings underlying a district court's decision not to depart based on sentencing entrapment is reviewed for clear error. *See United States v. Ross*, 372 F.3d 1097, 1113-14 (9th Cir. 2004).

24. Evidentiary Rulings

A district court's evidentiary rulings during trial are generally reviewed for an abuse of discretion. *See United States v. Gallenardo*, 579 F.3d 1076, 1081 (9th Cir. 2009).[71] Evidentiary rulings will be reversed for abuse of discretion only if such error more likely than not affected the verdict. *See United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004); *United States v. Alvarez*, 358 F.3d 1194, 1205 (9th Cir. 2004); *United States v. Workinger*, 90 F.3d 1409, 1412 (9th Cir. 1996). When no objection is made, this court may review for plain error, but may reverse only if the defendant persuades this court that the error was prejudicial in that it "affected the outcome of the district court proceeding." *United States v. Sine*, 493 F.3d 1021, 1038 (9th Cir. 2007).[72]

Although review of evidentiary rulings is generally for abuse of discretion, this court has recognized that such issues may present issues of law which are reviewed de novo. *See United States v. Lynch*, 367 F.3d 1148, 1159 (9th Cir. 2004) (reviewing evidentiary ruling that precluded defendant's proffered defense).[73] For example, the district court's

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[69] *See also United States v. Hancock*, 231 F.3d 557, 561 (9th Cir. 2000); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000).

[70] *See also United States v. Reese*, 60 F.3d 660, 661 (9th Cir. 1995); *United States v. Lorenzo*, 43 F.3d 1303, 1306 (9th Cir. 1995).

[71] *See also United States v. Alvarez*, 358 F.3d 1194, 1205 (9th Cir. 2004) (noting "wide discretion"); *United States v. Pang*, 362 F.3d 1187, 1191 (9th Cir. 2004) (foundation); *United States v. Lynch*, 367 F.3d 1148, 1159 (9th Cir. 2004); *United States v. Bensimon*, 172 F.3d 1121, 1130 (9th Cir. 1999).

[72] *See also United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996); *United States v. Flores*, 172 F.3d 695, 698 (9th Cir. 1999); *United States v. Serang*, 156 F.3d 910, 915 (9th Cir. 1998).

[73] *See United States v. Hardy*, 289 F.3d 608, 612 (9th Cir. 2002) (relevance); *United States v. Angwin*, 271 F.3d 786, 798 (9th Cir. 2001)

interpretations of the Federal Rules of Evidence are reviewed de novo. *See* *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011); *United States v. W.R. Grace*, 504 F.3d 745, 758-59 (9th Cir. 2007).[74]

A district court has broad discretion whether to admit extrinsic evidence in a criminal case. *See* *United States v. Higa*, 55 F.3d 448, 452 (9th Cir. 1995). Note, however, that when the issue is framed as a potential violation of the Sixth Amendment's Confrontation Clause, review is de novo. *See* *United States v. Saya*, 247 F.3d 929, 937 (9th Cir. 2001) (as amended). The district court's decision to admit or reject impeachment evidence is reviewed for an abuse of discretion. *See* *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002) (prior bad acts).[75]

25. Expert Testimony

A district court's decision to admit expert opinion testimony is reviewed for abuse of discretion. *See* *United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002) (noting such decisions will not be reversed unless "manifestly erroneous").[76] The trial court's decision to exclude expert

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(noting "rulings which raise predominantly legal questions" are reviewed de novo), *overruled in part on other grounds by* *United States v. Lopez*, 484 F.3d 1186, 1200 n.17 (9th Cir. 2007) (en banc); *United States v. James*, 169 F.3d 1210, 1214 (9th Cir. 1999) (en banc); *United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999).

[74] *See also* *United States v. Yida*, 498 F.3d 945, 949 (9th Cir. 2007); *United States v. Sioux*, 362 F.3d 1241, 1244 n.5 (9th Cir. 2004); *United States v. Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999).

[75] *See, e.g.*, *United States v. Beckman*, 298 F.3d 788, 792 (9th Cir. 2002) (harmless error); *United States v. Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999) (prior criminal conviction); *United States v. Beltran*, 165 F.3d 1266, 1269 (9th Cir. 1999) (prior inconsistent statements); *United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996) (prior crime).

[76] *See also* *United States v. McCaleb*, 552 F.3d 1053, 1060 (9th Cir. 2009) (whether testimony was sufficiently reliable); *United States v. Moran*, 493 F.3d 1002, 1008 (9th Cir. 2007) (on expert witnesses and impermissible legal conclusions); *United States v. Freeman*, 498 F.3d 893, 900 (9th Cir. 2007) (admitting a single person as both lay and expert witness); *United States v. Hanna*, 293 F.3d 1080, 1085 (9th Cir. 2002); *United States v. Abonce-Barrera*, 257 F.3d 959, 964 (9th Cir. 2001) (whether an expert

testimony is also reviewed for an abuse of discretion. *See* *United States v. Laurienti*, 611 F.3d 530, 547 (9th Cir. 2010); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 652 (9th Cir. 2006).[77] Despite attempts to settle on a single formulation, cases continue to refer to both "abuse of discretion" and "manifest error" in discussing the standard of review for decisions on expert testimony.[78]

When no objection is made, review is limited to plain error analysis; reversal is mandated only if the district court committed a clear or obvious error that affected substantial rights or was prejudicial. *See* *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007); *United States v. Sherwood*, 98 F.3d 402, 408 (9th Cir. 1996); *see also* *United States v. Varela-Rivera*, 279 F.3d 1174, 1177-78 (9th Cir. 2002) (noting circumstances that preserve defendant's right of review under abuse of discretion standard rather than plain error); *United States v. Seschillie*, 310 F.3d 1208, 1212 (9th Cir. 2002), (applying harmless error review).

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witness has sufficient qualifications to testify); *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000); *United States v. Marsh*, 26 F.3d 1496, 1502 (9th Cir. 1994) (refusal to allow an expert to testify regarding a witness's psychiatric condition).

[77] *See also* *United States v. Prime*, 431 F.3d 1147, 1152 (9th Cir. 2005); *United States v. Seschillie*, 310 F.3d 1208, 1211-12 (9th Cir. 2002); *United States v. Johnson*, 297 F.3d 845, 862 (9th Cir. 2002); *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000).

[78] In 1997, the Ninth Circuit sitting en banc noted that "although there appears to be no practical difference" between abuse of discretion and manifest error review, earlier cases had used the two standards inconsistently. The court explicitly adopted abuse of discretion as the proper standard, "to the extent [the two standards were] … different." *United States v. Morales*, 108 F.3d 1031, 1034 & n.1 (9th Cir. 1997) (en banc). Later that same year, the Supreme Court conflated the two terms by stating that abuse of discretion is the proper standard in reviewing decisions on expert testimony, and describing that standard as requiring reversal only where the decision was "manifestly erroneous." *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997). Subsequent cases have again used the terms in parallel. *See* *United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002).

"The trial court has wide discretion in determining whether particular scientific tests are reliable enough to permit expert testimony based upon their results." *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988) (citations omitted); *see also United States v. McCaleb*, 552 F.3d 1053, 1060 (9th Cir. 2009) (noting district court has broad discretion when discharging gatekeeping function).

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. *See United States v. Nelson*, 137 F.3d 1094, 1101 n.2 (9th Cir. 1998); *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996). A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion that is reviewed for an abuse of discretion. *See United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000).

26. Extrinsic Evidence

A district court has broad discretion to decide whether to admit extrinsic evidence in a criminal case. *See United States v. Higa*, 55 F.3d 448, 452 (9th Cir. 1995). The court's decision to admit evidence of extrinsic acts is reviewed for an abuse of discretion. *See United States v. Blackstone*, 56 F.3d 1143, 1145 (9th Cir. 1995). Note, however, that when the issue is framed as a potential violation of the Sixth Amendment's Confrontation Clause, review is de novo. *See United States v. Saya*, 247 F.3d 929, 937 (9th Cir. 2001) (as amended). Review is also de novo of the denial of a motion for mistrial based on a contention that the jury improperly reviewed extrinsic evidence. *See United States v. Prime*, 431 F.3d 1147, 1157 (9th Cir. 2005) (noting "independent review").

27. Federal Rules

The district court's interpretation of the federal rules is reviewed de novo. *See United States v. W.R.*. *Grace*, 504 F.3d 745, 758-59 (9th Cir. 2007) (evidence); *United States v. Fort*, 472 F.3d 1106, 1109 (9th Cir. 2007) (criminal procedure).

28. Fifth Amendment Rights

Whether there has been a violation of a defendant's Fifth Amendment right is reviewed de novo. *See United States v. Lopez*, 500 F.3d 840, 844

(9th Cir. 2007) (references to defendant's silence).[79] A witness's claim of Fifth Amendment privilege is reviewed de novo. *See* *United States v. Rubio-Topete*, 999 F.2d 1334, 1338 (9th Cir. 1993). Note that Fifth Amendment violations are subject to harmless error review. *See* *Lopez*, 500 F.3d at 844; *United States v. Velarde-Gomez*, 269 F.3d 1023, 1034-35 (9th Cir. 2001) (en banc).

A trial court's decision to exclude a witness's testimony based on an anticipated invocation of the Fifth Amendment privilege against self-incrimination is reviewed for an abuse of discretion. *See* *United States v. Klinger*, 128 F.3d 705, 709 (9th Cir. 1997). The court's denial of an evidentiary hearing on the issue is also reviewed for an abuse of discretion. *See* *id.*

The district court's refusal to hold a *Kastigar* hearing is reviewed for an abuse of discretion. *See* *United States v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996); *United States v. Dudden*, 65 F.3d 1461, 1468 (9th Cir. 1995). If a hearing is held, the district court's findings of fact are reviewed for clear error. *See* *Anderson*, 79 F.3d at 1525 n.4. Whether a defendant's testimony is immunized is a question of law reviewed de novo. *See* *id.* at 1525.

29. *Griffin* Violations

Prosecutors are forbidden from commenting on a defendant's decision not to testify. *See* *Griffin v. California*, 380 U.S. 609, 615 (1985). *Griffin* violations are reviewed de novo. *See* *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002). When there is no objection to the prosecutor's comments, review is for plain error. *See* *United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011); *United States v. Tam*, 240 F.3d 797, 801 (9th Cir. 2001); *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999). When the defendant does object, harmless error applies. *See* *United States v.*

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[79] *See also* *United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003) (due process); *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (references to defendant's silence); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc) (evidence of defendant's physical or emotional reaction); *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001) (judge's reference to defendant's decision not to testify).

Velarde-Gomez, 269 F.3d 1023, 1034-35 (9th Cir. 2001) (en banc); *cf. Tucker*, 641 F.3d at 1120 (in non-*Griffin* case, explaining where an objection to prosecutorial misconduct is raised in the trial court and overruled, review is for abuse of discretion).

30. Hearsay

Whether the district court correctly construed the hearsay rule is a question of law reviewable de novo. *See United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007).[80] However, a district court's decision to admit evidence under an exception to the hearsay rule is reviewed for an abuse of discretion. *See United States v. Molina*, 596 F.3d 1166, 1168 (9th Cir. 2010); *United States v. Washington*, 462 F.3d 1124, 1135 (9th Cir. 2006).[81] The court's decision to exclude evidence under the hearsay rule is reviewed for an abuse of discretion. *See Mitchell*, 502 F.3d at 964.[82] The court's decision to consider hearsay at sentencing is also reviewed for an abuse of discretion. *See United States v. Berry*, 258 F.3d 971, 976 (9th Cir. 2001); *United States v. Chee*, 110 F.3d 1489, 1492 (9th Cir. 1997).

Note that a ruling that a witness is unavailable is reviewed for an abuse of discretion. *See United States v. Yida*, 498 F.3d 945, 952 (9th Cir. 2007); *United States v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002); *United States v. Magana-Olvera*, 917 F.2d 401, 407 (9th Cir. 1990). If a witness is deemed unavailable, the court's decision to admit that witness's statement is reviewed for an abuse of discretion. *See Magana-Olvera*, 917 F.2d at 407. The denial of a continuance based upon the absence of a witness is reviewed for an abuse of discretion. *See United States v. Foster*,

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[80] *See also United States v. Yida*, 498 F.3d 945, 949 (9th Cir. 2007); *United States v. Washington*, 462 F.3d 1124, 1135 (9th Cir. 2006); *United States v. Weiland*, 420 F.3d 1062, 1074 n.9 (9th Cir. 2005); *United States v. Alvarez*, 358 F.3d 1194, 1214 (9th Cir. 2004); *United States v. Orellana-Blanco*, 294 F.3d 1143, 1148 (9th Cir. 2002).

[81] *See also Weiland*, 420 F.3d at 1074 n.9; *Alvarez*, 358 F.3d at 1214 (noting error may be harmless); *United States v. Scholl*, 166 F.3d 964, 978 (9th Cir. 1999).

[82] *See also Yida*, 498 F.3d at 949; *United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003); *United States v. Alarcon-Simi*, 300 F.3d 1172, 1175 (9th Cir. 2002).

985 F.2d 466, 469 (9th Cir.), *amended by* 995 F.2d 882 (9th Cir. 1993), *and* 17 F.3d 1256 (9th Cir. 1994).

However, the refusal to dismiss based on the prosecutor's failure to retain a witness is reviewed de novo. *See United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002); *Arizona v. Johnson*, 351 F.3d 988, 993 (9th Cir. 2003) (direct appeal from trial conducted pursuant to 28 U.S.C. § 1442(a)(1)).

In collateral proceedings, "[a] state trial court's decision that a witness is constitutionally 'unavailable' is an evidentiary question we review de novo, rather than for an abuse of discretion." *Acosta-Huerta v. Estelle*, 7 F.3d 139, 143 (9th Cir. 1992); *see also Jackson v. Brown*, 513 F.3d 1057, 1082-83 (9th Cir. 2008); *Windham v. Merkle*, 163 F.3d 1092, 1102 (9th Cir. 1998) (explaining that de novo review applies to determining whether the Supreme Court's standards for unavailability have been met).

31. Immunity from Prosecution

"[T]he decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch." *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984). Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. *See McKnight v. Torres*, 563 F.3d 890, 892 (9th Cir. 2009); *United States v. Wilson*, 392 F.3d 1055, 1059 (9th Cir. 2005) (as amended); *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995). The denial of a *Kastigar* hearing is reviewed for an abuse of discretion. *See Dudden*, 65 F.3d at 1468; *but see United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (district court's denial of a defense motion for an evidentiary hearing on use immunity raises mixed questions of fact and law reviewed de novo).

The district court's finding that the government's evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. *See United States v. Montoya*, 45 F.3d 1286, 1291 (9th Cir. 1995); *United States v. Baker*, 10 F.3d 1374, 1415 (9th Cir. 1993), *overruled in part on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), *overruled in part by United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc). Whether the government has violated its obligation to disclose

immunity agreements with a prosecution witness is a question of law reviewed de novo. *See* *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999). Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. *See* *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). Underlying factual findings are reviewed for clear error. *See* *id.*

32. Impeachment Evidence

The district court's decision to admit impeachment evidence is reviewed for an abuse of discretion. *See* *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002) (prior bad acts).[83] The trial court's refusal to allow impeachment evidence is also reviewed for an abuse of discretion. *See* *United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996) (prior crime).

33. In Absentia Proceedings

"Whether a judge has the power to try a defendant in absentia is an issue of law, which we consider de novo." *United States v. Houtchens*, 926 F.2d 824, 826 (9th Cir. 1991). "The judge's factual finding that a defendant has knowingly and voluntarily failed to appear at trial is reviewable for clear error." *Id.*

34. In-Court Identification

Decisions involving in-court identification are reviewed for an abuse of discretion. *See* *United States v. Lumitap*, 111 F.3d 81, 83-84 (9th Cir. 1997); *United States v. Duran*, 4 F.3d 800, 803 (9th Cir. 1993). The trial court's decision to conduct an in-court identification process is reviewed for an abuse of discretion. *See* *United States v. Burdeau*, 168 F.3d 352, 358 (9th Cir. 1999).[84] The admission of in-court identification testimony is reviewed for an abuse of discretion. *See* *United States v. Dixon*, 201 F.3d 1223, 1229

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[83] *See also* *United States v. Beckman*, 298 F.3d 788, 792 (9th Cir. 2002) (harmless error); *United States v. Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999) (prior criminal conviction); *United States v. Beltran*, 165 F.3d 1266, 1269 (9th Cir. 1999) (prior inconsistent statements).

[84] *See also* *United States v. Carbajal*, 956 F.2d 924, 929 (9th Cir. 1992); *United States v. Walitwarangkul*, 808 F.2d 1352, 1353 (9th Cir. 1987).

(9th Cir. 2000); *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989). The denial of a request for an in-court lineup is also reviewed for an abuse of discretion. *See* *Dixon*, 201 F.3d at 1229; *Lumitap*, 111 F.3d at 83.

35. Ineffective Assistance of Counsel

Whether a defendant received ineffective assistance of counsel is reviewed de novo. *See* *Heishman v. Ayers*, 621 F.3d 1030, 1036 (9th Cir. 2010) (per curiam); *Womack v. Del Papa*, 497 F.3d 998, 1002 (9th Cir. 2007) (§ 2254); *United States v. Labrada-Bustamante*, 428 F.3d 1252, 1260 (9th Cir. 2005); *Allen v. Woodford*, 395 F.3d 979, 992 (9th Cir. 2005) (§ 2254); *United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); *United States v. Mack*, 164 F.3d 467, 471 (9th Cir. 1999) (direct appeal).[85]

Note that claims of ineffective assistance of counsel are generally inappropriate on direct appeal. *See* *United States v. Rahman*, 642 F.3d 1257, 1259-60 (9th Cir. 2011) (declining to review ineffective assistance of counsel claim on direct appeal); *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003) (explaining rationale); *United States v. McKenna*, 327 F.3d 830, 845 (9th Cir. 2003) (noting exceptions);[86] *see also* *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (electing to review claim on direct appeal); *United States v. Mack*, 164 F.3d 467, 471 (9th Cir. 1999) (same).

A defendant claiming ineffective assistance of counsel must demonstrate (1) that counsel's actions were outside the wide range of professionally competent assistance, and (2) that defendant was prejudiced by reason of counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984); *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003); *Mancuso v. Olivarez*, 292 F.3d 939, 953-54 (9th Cir. 2002) (explaining standards); *see also* *Leavitt v. Arave*, 646 F.3d 605, 608 (9th Cir. 2011)

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[85] *See also* *United States v. Alaimalo*, 313 F.3d 1188, 1191 (9th Cir. 2002) (§ 2255); *Mancuso v. Olivarez*, 292 F.3d 939, 949 (9th Cir. 2002) (§ 2254); *LaGrand v. Stewart*, 133 F.3d 1253, 1269-70 (9th Cir. 1998) (noting claim presents a mixed question of law and fact reviewed de novo).

[86] *See also* *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) (declining review); *United States v. Ross*, 206 F.3d 896, 899 (9th Cir. 2000) (noting when direct review is permissible).

(habeas). The district court's findings of fact are reviewed for clear error. *See* *Leavitt*, 646 F.3d at 608; *Fry*, 322 F.3d at 1200; *United States v. Alvarez-Tautimez*, 160 F.3d 573, 575 (9th Cir. 1998).

The district court's decision not to conduct an evidentiary hearing on an ineffective assistance of counsel claim is reviewed for an abuse of discretion. *See* *Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004);[87] *see also* *Hovey v. Ayers*, 458 F.3d 892, 910 (9th Cir. 2006) (refusing expert witnesses during evidentiary hearing).

36. *Jewell* Instruction

See II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 41. Jury Instructions, b. Adequacy of Instructions & j. *Jewell* Instructions.

37. Judge Conduct

"A federal judge has broad discretion in supervising trials, and his or her behavior during trial justifies reversal only if [he or she] abuses that discretion." *United States v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988) (citations omitted).[88] Allegations of judicial misconduct are reviewed for plain error when a defendant fails to object at trial. *See* *United States v. Morgan*, 376 F.3d 1002, 1007 (9th Cir. 2004); *United States v. Springer*, 51 F.3d 861, 864 n.1 (9th Cir. 1995).

A district court's decision whether to grant a motion for recusal is reviewed for an abuse of discretion. *See* *United States v. Sutcliffe*, 505 F.3d 944, 957-58 (9th Cir. 2007); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002).[89] When recusal is not raised below, the allegation of

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[87] *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (§ 2255); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158-59 (9th Cir. 2000) (habeas).

[88] *See also* *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (whether to impose security measures during trial); *United States v. Morgan*, 376 F.3d 1002, 1006-07 (9th Cir. 2004) (questioning of witness).

[89] *See also* *United States v. Silver*, 245 F.3d 1075, 1078 (9th Cir. 2001); *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000); *United States v. Eshkol*, 108 F.3d 1025, 1030 (9th Cir. 1997); *see also* *United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997) (motion to disqualify); *United*

judicial bias is reviewed for plain error. *See* *United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991).

38. Juror Misconduct

The standard of review of a trial court's decisions regarding jury incidents is abuse of discretion. *See* *United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1081-82 (9th Cir. 2004) (noting "extremely deferential standard").[90] The district court has considerable discretion in determining whether to hold an investigative hearing on allegations of jury misconduct or bias and in defining its nature and extent. *See* *United States v. Olano*, 62 F.3d 1180, 1192 (9th Cir. 1995). "Our review ultimately is limited to determining whether the district court, in view of all the circumstances, so abused its discretion that [the defendant] must be deemed to have been deprived of his Fifth Amendment due-process or Sixth Amendment impartial-jury guarantees." *Id.* (internal quotation omitted). The presence of a biased juror cannot be harmless; the error requires a new trial without the showing of prejudice. *See* *Simtob*, 485 F.3d at 1064; *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002); *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc). Note in *United States v. Mitchell*, 568 F.3d 1147, 1150 (9th Cir. 2009), the court recognized there was an ambiguity and/or conflict with regard to whether plain error review is appropriate for unpreserved claims of juror bias, but declined to resolve the issue.

A district court's decision to replace a juror with an alternate is reviewed for an abuse of discretion. *See* *United States v. Alexander*, 48 F.3d 1477, 1485 (9th Cir. 1995). The trial court's decision to excuse a juror after deliberations have commenced is also reviewed for abuse of discretion. *See* *United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007).[91]

States v. $292,888.04 in *U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995) (civil forfeiture action).

[90] *See also* *United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007); *United States v. Shryock*, 342 F.3d 948, 973 (9th Cir. 2003); *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002); *United States v. Beard*, 161 F.3d 1190, 1194 (9th Cir. 1998).

[91] *See also* *United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999); *United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993); *United States v. Egbuniwe*, 969 F.2d 757, 760 (9th Cir. 1992).

Deference is paid to the trial judge, since the trial judge is uniquely qualified to appraise the probable effect of misconduct upon the jury, such as the materiality of extraneous material and its prejudicial nature. *See* *United States v. Madrid*, 842 F.2d 1090, 1092 (9th Cir. 1988);[92] *but see* *United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999) (noting district court's discretion is not unbounded).

A district court's decision to excuse a juror for just cause is reviewed for an abuse of discretion. *See* *United States v. Lindsey*, 634 F.3d 541, 553 (9th Cir. 2011); *United States v. Mitchell*, 502 F.3d 931, 955 (9th Cir. 2007); *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (noting also that implied bias presents a mixed issue of law and fact reviewed de novo).[93] The court's decision not to excuse a juror is also reviewed for an abuse of discretion. *See* *Long*, 301 F.3d at 1101;[94] *see also* *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (reversing Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

A district court's order granting a new trial based on juror misconduct is reviewed for an abuse of discretion. *See* *United States v. Edmond*, 43 F.3d 472, 473 (9th Cir. 1994); *but see* *United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998) (grant of motion for new trial based on jurors' improper exposure to extrinsic evidence is subject to "independent" review). The court's denial of a motion for a new trial based on allegations of juror misconduct is also reviewed for an abuse of discretion. *See* *United States v. Rosenthal*, 454 F.3d 943, 949 (9th Cir. 2006).[95] The district court's findings

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[92] *See also* *United States v. LaFleur*, 971 F.2d 200, 206 (9th Cir. 1991) (same standard); *United States v. Hernandez*, 952 F.2d 1110, 1117 (9th Cir. 1991) (review is independent but reviewing court must "remain mindful of the trial court's conclusions").

[93] *See also* *United States v. Padilla-Mendoza*, 157 F.3d 730, 733 (9th Cir. 1998).

[94] *United States v. Miguel*, 111 F.3d 666, 673 (9th Cir. 1997); *United States v. Alexander*, 48 F.3d 1477, 1484-85 (9th Cir. 1995).

[95] *See also* *United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002); *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001) (as amended); *but see* *United States v. Lopez*, 543 F.3d 509 n.4 (9th Cir. 2008) (stating, "the denial of a motion for a new trial is typically reviewed for abuse of

of fact relating to the issue of juror misconduct are reviewed for clear error. *See* *Long*, 301 F.3d at 1101.[96]

In habeas, whether an instance of juror misconduct was prejudicial to the defendant presents a mixed question of law and fact reviewed de novo. *See* *Hamilton v. Ayers*, 583 F.3d 1100, 1106-07 (9th Cir. 2009); *see also* *Caliendo v. Warden*, 365 F.3d 691, 694 (9th Cir. 2004) (noting issues of juror misconduct are reviewed de novo).

39. Jury Examination of Evidence

The trial court's decision to allow a jury to have transcripts during deliberations is reviewed for an abuse of discretion. *See* *United States v. Richard*, 504 F.3d 1109, 1113-1116 (9th Cir. 2007) (noting that court's discretion is not boundless and listing factors).[97] The court's decision to replay tape-recorded conversation evidence to the jury is reviewed for an abuse of discretion. *See* *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999). The trial court's decision to reread testimony to the jury or permit the jury to have excerpts of the testimony is also reviewed for an abuse of discretion. *See* *United States v. Stinson*, 647 F.3d 1196, 1217 (9th Cir. 2011); *Richard*, 504 F.3d at 1113.[98]

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discretion, [however] where the motion is based on juror misconduct … review is *de novo*."); *United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998) (acknowledging abuse of discretion review, but noting that "where jurors are exposed to extrinsic evidence, however, our review 'is an independent one'" when considering a new trial motion).

[96] *See also* *United States v. Elias*, 269 F.3d 1003, 1020 (9th Cir. 2001) (as amended); *but see* *United States v. Martinez-Martinez*, 369 F.3d 1076, 1082 (9th Cir. 2004) (reviewing findings for manifest error or abuse of discretion).

[97] *See also* *United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir. 1998); *United States v. Tisor*, 96 F.3d 370, 377 (9th Cir. 1996) (during trial); *United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir. 1995).

[98] *See also* *Montgomery*, 150 F.3d at 999; *United States v. Hernandez*, 27 F.3d 1403, 1408 (9th Cir. 1994); *United States v. Guess*, 745 F.2d 1286, 1288 (9th Cir. 1984) ("[I]t is within the trial court's discretion to replay tapes or have the court reporter reread portions of testimony at the jury's request during deliberations.").

A trial court's finding that transcripts are accurate and complete cannot be disturbed unless clearly erroneous. *See* *United States v. Carrillo*, 902 F.2d 1405, 1410 (9th Cir. 1990). A court's decision to allow a jury to have English translations is reviewed for an abuse of discretion. *See* *United States v. Abonce-Barrera*, 257 F.3d 959, 963 (9th Cir. 2001).[99]

The erroneous inclusion of audio tapes allowed in the jury room that were not admitted into evidence is constitutional error subject to the harmless error standard. *See* *Eslaminia v. White*, 136 F.3d 1234, 1237 & n.1 (9th Cir. 1998) (habeas).[100]

The trial court decision whether to allow jurors to take notes during trial is reviewed for an abuse of discretion. *See* *United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir. 1993), *overruled in part on other grounds by* *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), *overruled in part by* *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc).

The denial of a motion for mistrial based on a contention that the jury was improperly exposed to extrinsic evidence is reviewed de novo. *See* *United States v. Prime*, 431 F.3d 1147. 1157 (9th Cir. 2005) (noting "independent review").

40. Jury Inquiries

a. District Court's Response

A district court's response to a jury's inquiry is reviewed for an abuse of discretion. *See* *United States v. Verduzco*, 373 F.3d 1022, 1030 n.3 (9th

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99 *See also* *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999).

100 *But see* *United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996), *amended by* 140 F.3d 1244 (9th Cir. 1998) (allowing unplayed audio tapes into the jury room is structural error); *see also* *United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998) (grant of motion for new trial based on jurors' improper exposure to extrinsic evidence is subject to "independent" review).

Cir. 2004); *United States v. Romero-Avila*, 210 F.3d 1017, 1024 (9th Cir. 2000) (explaining abuse of discretion standard).[101]

b. Supplemental Instructions

The court's decision whether to give supplemental instructions is also reviewed for an abuse of discretion. *See United States v. McIver*, 186 F.3d 1119, 1130 (9th Cir. 1999); *United States v. Solomon*, 825 F.2d 1292, 1295 (9th Cir. 1987) ("[N]ecessity, extent and character of supplemental instructions lies within the discretion of the trial court.").[102] When defendant does not challenge the supplemental instruction or fails to state distinctly the grounds for the objection, review is limited to plain error. *See United States v. Banks*, 514 F.3d 959, 974 (9th Cir. 2008).[103] Whether supplemental jury instructions correctly state the elements of an offense is a question of law reviewed de novo. *See United States v. Verduzco*, 373 F.3d 1022, 1030 n.3 (9th Cir. 2004); *United States v. Si*, 343 F.3d 1116, 1126 (9th Cir. 2003).

41. Jury Instructions

a. Formulation of Instructions

A district court's formulation of jury instructions is reviewed for an abuse of discretion. *See United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010); *United States v. Dearing*, 504 F.3d 897, 900 (9th Cir. 2007); *United States v. Garcia-Rivera*, 353 F.3d 788, 791-92 (9th Cir. 2003) ("'In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation.'"); *United States v. Franklin*, 321 F.3d 1231, 1240-41 (9th Cir. 2003) (considering "'the instructions as a whole, and in context'"); *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000) ("The trial court has substantial

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[101] *See also Arizona v. Johnson*, 351 F.3d 988, 993 (9th Cir. 2003) (direct appeal from trial conducted pursuant to 28 U.S.C. § 1442(a)(1)); *United States v. Amlani*, 111 F.3d 705, 716 (9th Cir. 1997).

[102] *See also United States v. Dorri*, 15 F.3d 888, 892 (9th Cir. 1994).

[103] *See also United States v. McIver*, 186 F.3d 1119, 1130-31 (9th Cir. 1999); *United States v. Stapleton*, 293 F.3d 1111, 1118 n.3 (9th Cir. 2002); *Dorri*, 15 F.3d at 891 (explaining plain error rule).

latitude so long as its instructions fairly and adequately cover the issues presented." (internal quotation marks and citation omitted)).[104]

b. Adequacy of Instructions

Whether jury instructions omit or misstate elements of a statutory crime, *see* *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010),[105] or adequately cover a defendant's proffered defense, *see* *United States v. Morsette*, 622 F.3d 1200, 1201 (9th Cir. 2010) (per curiam),[106] are questions of law reviewed de novo.

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[104] *See also* *United States v. Tatoyan*, 474 F.3d 1174, 1179 (9th Cir. 2007); *United States v. Shipsey*, 363 F.3d 962, 966 n.3 (9th Cir. 2004); *United States v. Si*, 343 F.3d 1116, 1126 (9th Cir. 2003) (supplemental instructions); *United States v. Stapleton*, 293 F.3d 1111, 1114 (9th Cir. 2002); *United States v. Amlani*, 111 F.3d 705, 716 (9th Cir. 1997).

[105] *See also* *United States v. Cherer*, 513 F.3d 1150, 1155 (9th Cir. 2008) ("[T]he relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation."); *Stapleton*, 293 F.3d at 1114; *United States v. Henderson*, 243 F.3d 1168, 1170 (9th Cir. 2001) (If the instructions misstate the offense, "we reverse a defendant's conviction unless the misstatement was harmless beyond a reasonable doubt."); *United States v. Romo-Romo*, 246 F.3d 1272, 1274 (9th Cir. 2001) ("Whether a jury instruction misstates elements of a statutory crime is a question of law reviewed de novo."); *United States v. Knapp*, 120 F.3d 928, 930 (9th Cir. 1997); *see also* *United States v. Vallejo*, 237 F.3d 1008, 1024 (9th Cir. 2001), *amended by* 246 F.3d 1150 (9th Cir. 2001) (If "the instructions 'fairly and adequately covered the elements of the offense,' we review the instruction's precise formulation for abuse of discretion.'"); *United States v. Frega*, 179 F.3d 793, 807 n.16 (9th Cir. 1999) ("The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented. A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.") (citation omitted); *United States v. Gergen*, 172 F.3d 719, 724 (9th Cir. 1999) (supplemental jury instruction).

[106] *See also* *United States v. Solorzano-Rivera*, 368 F.3d 1073, 1076 (9th Cir. 2004); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1083 (9th Cir. 2004); *United States v. Shipsey*, 363 F.3d 962, 966 n.3 (9th Cir. 2004); *United States v. Leyva*, 282 F.3d 623, 625 (9th Cir. 2002) (reviewing rejected instruction); *see also* *United States v. Iverson*, 162 F.3d 1015, 1022

c. Denial of Requested Instruction

The appropriate standard for reviewing a district court's denial of a defendant's requested jury instruction depends on the issue being reviewed. *See* *United States v. Hairston*, 64 F.3d 491, 493-94 (9th Cir. 1995) (citing *United States v. Duran*, 59 F.3d 938, 941 (9th Cir.1995)); *see also* *United States v. Somsamouth*, 352 F.3d 1271, 1274 (9th Cir. 2003).

The denial of a defendant's jury instruction due to an inadequate factual basis is reviewed for an abuse of discretion. *See* *United States v. Daane*, 475 F.3d 1114, 1119 (9th Cir. 2007); *United States v. Wills*, 88 F.3d 704, 715 (9th Cir. 1996) (noting clarification of standard); *see also* *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011). Denial of a jury instruction based on a question of law is reviewed de novo. *See* *United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010); *United States v. Wiseman*, 274 F.3d 1235, 1240 (9th Cir. 2001); *United States v. Eshkol*, 108 F.3d 1025, 1028 (9th Cir. 1997).

A district court's refusal to give a lesser-included offense involves two questions. The first question – whether the offense for which instruction is sought is a lesser-included offense of the charged offense – is a legal question subject to de novo review. Second, the district court considers whether the record contains evidence that would support conviction of the lesser offense – an inquiry reviewed for abuse of discretion. *See* *United States v. Rivera-Alonzo*, 584 F.3d 829, 832 (9th Cir. 2009); *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007) (clarifying that there is no split in Ninth Circuit authority). [107] If the defendant did not request the lesser included offense instruction or does not object to its omission, review is only

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& n.5 (9th Cir. 1998) (discussing preservation of issue); *United States v. Amlani*, 111 F.3d 705, 716 n.5 (9th Cir. 1997) (distinguishing allegation that instructions were potentially misleading).

[107] *See also* *United States v. Naghani*, 361 F.3d 1255, 1262 (9th Cir. 2004) ("A lesser included offense instruction is proper where (1) the offense on which the instruction is sought is a lesser included offense in the offense charged and (2) the jury could rationally conclude that the defendant was guilty of the lesser but not of the greater offense. We review the first step de novo, and the second for abuse of discretion.").

for plain error. *See* *United States v. Anderson*, 201 F.3d 1145, 1148 (9th Cir. 2000).

d. Special Verdict Forms

The district court's decision to use a special verdict form over a defendant's objection is reviewed for an abuse of discretion. *See* *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998). The formulation of a special verdict form is reviewed for an abuse of discretion. *See* *United States v. Stinson*, 647 F.3d 1196, 1218 (9th Cir. 2011). Any error is subject, however, to a harmless error review. *See* *United States v. Perez*, 129 F.3d 1340, 1342 (9th Cir. 1997). When a defendant does not object, review is for plain error. *See* *United States v. Vasquez-Velasco*, 15 F.3d 833, 847 (9th Cir. 1994). In some instances, however, when the information sought in a special verdict is relevant to the sentence imposed, the government has a duty to request a special verdict, and review of the sentence imposed is reviewed de novo. *See* *United States v. Garcia*, 37 F.3d 1359, 1370 (9th Cir. 1994), *abrogated on other grounds by* *United States v. Jackson*, 167 F.3d 1280 (9th Cir. 1999).

e. Due Process Challenges

Whether a jury instruction violated due process is reviewed de novo. *See* *United States v. Lopez*, 500 F.3d 840, 847 (9th Cir. 2007); *United States v. Trevino*, 419 F.3d 896, 902 (9th Cir. 2005). For example, whether an instruction violates due process by creating an unconstitutional presumption or inference is reviewed de novo. *See* *Tapia v. Roe*, 189 F.3d 1052, 1056 (9th Cir. 1999) (habeas); *United States v. Warren*, 25 F.3d 890, 897 (9th Cir. 1994). Whether a constitutionally deficient jury instruction is harmless error is reviewed de novo. *See* *Tapia*, 189 F.3d at 1055-56.

f. Procedure for Reviewing Instructions

In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation. *See* *United States v. Reed*, 575 F.3d 900, 926 (9th Cir. 2009); *United States v. Cherer*, 513 F.3d 1150, 1154 (9th Cir. 2008); *United States v. Tatoyan*, 474 F.3d 1174, 1179-80 (9th Cir. 2007); *United States v. Garcia-Rivera*, 353 F.3d 788, 792 (9th Cir. 2003); *United States v. Dixon*, 201 F.3d

1223, 1230 (9th Cir. 2000); *United States v. Frega*, 179 F.3d 793, 807 n.16 (9th Cir. 1999); *United States v. Knapp*, 120 F.3d 928, 930 (9th Cir. 1997).

The district court has substantial latitude so long as its instructions fairly and adequately cover the issues presented. *See* *Cherer*, 513 F.3d at 1154.[108]

A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *See* *Reed*. 575 F.3d at 926; *United States v. Smith*, 520 F.3d 1097, 1102 (9th Cir. 2008); *Ho v. Carey*, 332 F.3d 587, 593 (9th Cir. 2003) (granting habeas writ based on jury instruction error); *Dixon*, 201 F.3d at 1230.[109]

Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing they constitute an abuse of the district court's discretion. *Frega*, 179 F.3d at 807 n.16.

g. Harmless Error and Plain Error

A district court's failure to instruct the jury on an element of a crime may be harmless if the appellate court concludes that it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *United States v. Cherer*, 513 F.3d 1150, 1155 (9th Cir. 2008); *States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1197 (9th Cir. 2000) (en banc).

When there is no objection to the jury instructions at the time of trial, the court of appeals will review only for plain error. *See* *Jones v. United States*, 527 U.S. 373, 388 (1999); *United States v. Bhagat*, 436 F.3d 1140, 1147 (9th Cir. 2006); *United States v. Recio*, 371 F.3d 1093, 1099-1102 (9th Cir. 2004) (explaining when review is for plain error or harmless error); *United States v. Delgado*, 357 F.3d 1061, 1065 (9th Cir. 2004); *United States v. Franklin*, 321 F.3d 1231, 1240 (9th Cir. 2003). Plain error is error

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[108] *See also* *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000); *Frega*, 179 F.3d at 807 n.16; *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998).

[109] *See also* *United States v. Frega*, 179 F.3d 793, 807 n.16 (9th Cir. 1999); *United States v. Harrison*, 34 F.3d 886, 889 (9th Cir. 1994)

that is plain and affects substantial rights. *See* *Delgado*, 357 F.3d at 1065; *Franklin*, 321 F.3d at 1240; *see also* *United States v Houston*, 648 F.3d 806, 813 (9th Cir. 2011).[110]

h. Invited Error

If the district court gives jury instructions requested by the defendant, those instructions are nonreviewable under the invited error doctrine. *United States v. Burt*, 143 F.3d 1215, 1217 (9th Cir. 1998); *United States v. Perez*, 116 F.3d 840, 844 (9th Cir. 1997) (en banc). In *Perez*, however, this court limited that rule to situations where the defendant has "waived" his rights in contrast to "forfeited." *See* *Burt*, 143 F.3d at 1217; *Perez*, 116 F.3d at 845, 846. Thus, where a defendant submits flawed instructions, but neither defendant, government, nor the court is aware of the mistake, the error is not waived, but merely forfeited, and may be reviewed under the plain error standard. *See* *Burt*, 143 F.3d at 1217-18; *Perez*, 116 F.3d at 846; *see also* *United States v. Johnson*, 132 F.3d 1279, 1284 -85 (9th Cir. 1997) (applying plain error in same circumstances). When defendant rejects an instruction suggested by judge at trial, invited error does not preclude review of that omitted instruction. *See* *United States v. Alferahin*, 433 F.3d 1148, 1154 n.2 (9th Cir. 2006).

i. *Allen* Charges

The trial court's decision to instruct the jury with an *Allen* charge is reviewed for an abuse of discretion. *See* *United States v. Berger*, 473 F.3d 1080, 1089 (9th Cir. 2007).[111] The court's delivery of an *Allen* charge must be upheld unless it is clear from the record that the charge had an

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[110] *United States v. Garcia-Guizar*, 160 F.3d 511, 516, 522-23 (9th Cir. 1998) (noting plain error is a highly prejudicial error affecting substantial rights); *United States v. Klinger*, 128 F.3d 705, 712 (9th Cir. 1997) (noting plain error is "'error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection'"); *United States v. Lacy*, 119 F.3d 742, 749 (9th Cir. 1997) (noting plain error does not require reversal unless the error seriously affected the fairness, integrity, or public reputation of the judicial proceeding).

[111] *See also* *United States v. Steele*, 298 F.3d 906, 909 (9th Cir. 2002); *United States v. Daas*, 198 F.3d 1167, 1179 (9th Cir. 1999) (modified charge); *United States v. Nelson*, 137 F.3d 1094, 1109 (9th Cir. 1998).

impermissibly coercive effect on the jury. *See* *Berger*, 473 F.3d 1089; *United States v. Steele*, 298 F.3d 906, 909-10 (9th Cir. 2002); *United States v. Daas*, 198 F.3d 1167, 1179 (9th Cir. 1999) (modified charge); *United States v. Nelson*, 137 F.3d 1094, 1109 (9th Cir. 1998). Note, however, that whether a judge has improperly coerced a jury's verdict is a mixed question of law and fact reviewed de novo. *See* *Berger*, 473 F.3d at 1089; *see also* *United States v. Della Porta*, 653 F.3d 1043, 1047 (9th Cir. 2011).

j. *Jewell* Instructions

A district court's decision to give a "deliberate ignorance" or *Jewell* instruction is reviewed for abuse of discretion. *See* *United States v. Heredia*, 483 F.3d 913, 922 (9th Cir. 2007) (en banc). *Heredia* overruled the line of cases calling for de novo review. *See* *United States v. Shannon*, 137 F.3d 1112, 1117 (9th Cir. 1998), *overruled by Heredia*, 483 F.3d 913.

42. Jury Selection

a. Challenges for Cause

i. Voir Dire/Peremptory Challenges

A district court's voir dire procedures are reviewed for an abuse of discretion, and its findings regarding juror impartiality is for manifest error. *See* *United States v. Padilla-Mendoza*, 157 F.3d 730, 733 (9th Cir. 1998); *United States v. Warren*, 25 F.3d 890, 894 (9th Cir. 1994) ("The district court's selection of procedures for the exercise of peremptory challenges is reviewed for an abuse of discretion.").[112] Although this court reviews the district court's voir dire for abuse of discretion, whether a defendant was deprived of a fair trial by the nature of the voir dire is a legal question reviewed de novo. *See* *United States v. Milner*, 962 F.2d 908, 911 (9th Cir. 1992).

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[112] *See also* *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002); *United States v. Howell*, 231 F.3d 615, 627 (9th Cir. 2000); *United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999) (reviewing for an abuse of discretion the court's refusal to ask requested voir dire questions); *see also* *United States v. Sherwood*, 98 F.3d 402, 407 (9th Cir. 1996) (defendant has a right to be present at voir dire sidebars, but waives the right if not expressed).

The district court has considerable control over the administration of peremptory challenges and the scope of questioning permitted during voir dire. *See United States v Toomey*, 764 F.2d 678 (9th Cir. 1985). The sufficiency of voir dire questions asked by the district court is also reviewed for an abuse of discretion, *see United States v. Payne*, 944 F.2d 1458, 1474 (9th Cir. 1991), as is the court's refusal to ask defendant's requested voir dire questions, *see United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999).

Where the district court erroneously denies a peremptory challenge, the court applies "the standard of review that is appropriate under the circumstances of the district court's error." *United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011) (reviewing for plain error where defendant failed to object to district judge's miscounting of peremptory challenges).[113] The court may also abuse its discretion by failing to ask questions reasonably sufficient to test jurors for bias or partiality. *See United States v. Payne*, 944 F.2d 1458, 1474 (9th Cir. 1991).

Where there is no objection to voir dire, review is limited to plain error. *See United States v. Mitchell*, 502 F.3d 931, 955 (9th Cir. 2007); *United States v. Mendoza-Reyes*, 331 F.3d 1119, 1121 (9th Cir. 2003) (per curiam). The district court's failure to sua sponte conduct supplemental voir dire is reviewed for plain error. *See United States v. Gay*, 967 F.2d 322, 325 (9th Cir. 1992).

The number of peremptory challenges permitted by the Federal Rules of Criminal Procedure presents a question of law reviewed de novo. *See United States v. Machado*, 195 F.3d 454, 456 (9th Cir. 1999).

ii. Jury Misconduct

The district court's decisions regarding incidents of jury misconduct are reviewed for an abuse of discretion. *See United States v. Simtob*, 485

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[113] *See also United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (reversing Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

F.3d 1058, 1064 (9th Cir. 2007); *United States v. Shryock*, 342 F.3d 948, 973 (9th Cir. 2003). Thus, the district court's decision to excuse[114] or to not excuse[115] a juror for just cause is reviewed for an abuse of discretion. "When the defendant has made a timely objection to an error, the harmless error standard generally applies, and the government bears the burden of proving that the error was not prejudicial." *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998).

A district court's decision to replace a juror with an alternate is reviewed for an abuse of discretion. *See United States v. Alexander*, 48 F.3d 1477, 1485 (9th Cir. 1995); *Beard*, 161 F.3d at 1194-95 (discussing application of harmless error review); *United States v. Gay*, 967 F.2d 322, 325 (9th Cir. 1992).

b. Jury Composition/*Batson* Claims

A challenge to the composition of a jury is reviewed de novo. *See United States v. Torres-Hernandez*, 447 F.3d 699, 703 (9th Cir. 2006); *Thomas v. Borg*, 159 F.3d 1147, 1149 (9th Cir. 1998) (habeas).

"The standards of review for rulings on certain aspects of the *Batson* analysis are settled in this circuit." *Tolbert v. Page*, 182 F.3d 677, 680 n.5 (9th Cir. 1999) (explaining standards of review for *Batson* challenges) (en banc).

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[114] *See United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007); *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998); *United States v. McFarland*, 34 F.3d 1508, 1511 (9th Cir. 1994); *see also United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (noting also that implied bias presents a mixed issue of law and fact reviewed de novo).

[115] *See United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002) (noting presence of biased jury can never be harmless error); *United States v. Miguel*, 111 F.3d 666, 673 (9th Cir. 1997); *United States v. Alexander*, 48 F.3d 1477, 1484-85 (9th Cir. 1995); *see also United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (no constitutional right violated if the defendant uses a peremptory challenge to cure an erroneous refusal by the court to remove the juror for cause).

"When considering a *Batson* challenge, we review de novo whether a prosecutor's proclaimed reason for exercising a peremptory challenge was an adequate explanation." *United States v. You*, 382 F.3d 958, 967 (9th Cir. 2004) (citation omitted); *see also United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002).

"'A trial court's determination on discriminatory intent is a finding of fact entitled to deference and is reviewed for clear error.'" *You*, 382 F.3d at 967-68. For example, the determination whether a defendant established a prima facie showing of racial discrimination under *Batson* is reviewed for clear error. *See Steele*, 298 F.3d at 910; *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1218 (9th Cir. 2001). Clear error review also applies to the question whether the defendant has satisfied the ultimate burden of proving purposeful discrimination. *See Paulino v. Harrison*, 542 F.3d 692, 699 (9th Cir. 2008); *Tolbert*, 182 F.3d at 680 n.5.[116]

"[W]hether the challenged juror is a member of a protected class for *Batson* purposes is a question of law reviewed de novo." *Tolbert*, 182 F.3d at 680 n.5.

"Whether the district court was obliged to proceed to step three of the *Batson* process is a legal question we review de novo." *United States v. Alanis*, 335 F.3d 965, 967 n.1 (9th Cir. 2003).

Whether a particular jury satisfies the "representative jury" standard under *Batson* is a question of law reviewed de novo. *See United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992), *overruled on other grounds by United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010).

When defense counsel fails to preserve a *Batson* claim, review is limited to plain error. *See United States v. Contreras-Contreras*, 83 F.3d 1103, 1105 (9th Cir. 1996).

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[116] *See also Hernandez v. New York*, 500 U.S. 352, 364-65 (1991); *United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002) ("The trial court's findings regarding purposeful discrimination in jury selection are entitled to 'great deference' and will not be set aside unless clearly erroneous.") (internal quotation marks omitted).

The district court's "remedy" for a *Batson* violation is reviewed for an abuse of discretion. *See* *United States v. Ramirez-Martinez*, 273 F.3d 903, 910 (9th Cir. 2001), *overruled in part on other grounds*, *United States v. Lopez*, 484 F.3d 1186, 1200 (9th Cir. 2007) (en banc).

See also II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 5. *Batson* Claims.

c. Anonymous Jury

The district court's decision to empanel an anonymous jury is reviewed for an abuse of discretion. *See* *United States v. Shryock*, 342 F.3d 948, 970 (9th Cir. 2003) (deciding first impression question).

43. Materiality of a False Statement

In prosecutions under 18 U.S.C. § 1001 (false statements),[117] 26 U.S.C. § 7206 (filing false tax returns),[118] and 18 U.S.C. § 1623 (perjury),[119] and other statutes having the element of materiality, the question of materiality is a mixed question of law and fact to be submitted to the jury. *See* *United States v. Uchimura*, 125 F.3d 1282, 1284 (9th Cir. 1997) (discussing the leading Supreme Court case on the topic of materiality, *United States v. Gaudin*, stating that "the Supreme Court's reasoning applies with equal potency to every crime of which materiality is an element").[120]

If materiality is not an element of the crime, however, it need not be submitted to the jury. *See* *Uchimura*, 125 F.3d at 1284.[121] Whether

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[117] *See* *United States v. Gaudin*, 28 F.3d 943, 951 (9th Cir. 1994) (en banc).

[118] *See* *United States v. Scholl*, 166 F.3d 964, 980 (9th Cir. 1999).

[119] *See* *Johnson v. United States*, 520 U.S. 461, 465 (1997) (materiality is an element of perjury).

[120] *See also* *United States v. Alferahin*, 433 F.3d 1148, 1154-56 (9th Cir. 2006) (discussing materiality specific to denaturalization); *United States v. Service Deli, Inc.*, 151 F.3d 938, 941 (9th Cir. 1998) (discussing various formulations of materiality).

[121] *See also* *United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995) (per curiam) (false claims against the United States); *see also* *United States*

materiality is an element of a crime is a question of law reviewed de novo. *See* *United States v. Watkins*, 278 F.3d 961, 964 (9th Cir. 2002).

A district court's error in not charging a jury on the element of materiality is subject to harmless error review. *See* *Neder v. United States*, 527 U.S. 1, 8-15 (1999) (discussing framework to decide if harmless error review applies); *United States v. Du Bo*, 186 F.3d 1177, 1180 n.2 (9th Cir. 1999) (limiting *Neder* to petite juries, and not grand juries).

Plain error applies when defendant fails to object to a materiality instruction. *See* *United States v. Johnson*, 297 F.3d 845, 866 (9th Cir. 2002).[122]

44. Opening Statements

A district court's decision to order parties to deliver opening statements before voir dire is reviewed for an abuse of discretion. *See* *United States v. Goode*, 814 F.2d 1353, 1354-55 (9th Cir. 1987). The court's "broad discretion is to be limited only when a party's rights are somehow prejudiced." *Id.* at 1354.

45. Opinion Evidence

a. Expert Opinion Evidence

i. Admission or Exclusion of Evidence

A district court's decision to admit[123] or exclude[124] evidence is reviewed for an abuse of discretion and will be reversed only if manifestly

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v. Wells, 519 U.S. 482, 489-95 (1997) (false statements to federally insured bank).

[122] *See also* *United States v. Scholl*, 166 F.3d 964, 980-81 (9th Cir. 1999) ("[W]here the defendant failed to object to the materiality error, '[t]o warrant reversal in a case where a *Gaudin*-type error is made, the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.'" (second alternation in original, internal quotation marks omitted)); *United States v. Knapp*, 120 F.3d 928, 932 (9th Cir. 1997); *United States v. Nash*, 115 F.3d 1431, 1437 (9th Cir. 1997).

erroneous. *See* *United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002); *United States v. Finley*, 301 F.3d 1000, 1008 (9th Cir. 2002); *see also* *United States v. VonWillie*, 59 F.3d 922, 928 (9th Cir. 1995) (noting court has characterized the standard of review in different ways). Pursuant to this standard, the district court's refusal to allow an expert to testify regarding a witness's psychiatric condition, *see* *United States v. Marsh*, 26 F.3d 1496, 1502 (9th Cir. 1994), and decisions regarding experts on eyewitness identification reliability, *see* *United States v. Hicks*, 103 F.3d 837, 842 (9th Cir. 1996), *overruled in part on other grounds by* *United States v. W. R. Grace*, 526 F.3d 499, 502-03 (9th Cir. 2008); *United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994), are both reviewed for an abuse of discretion.

When no objection is made, review is limited to plain error analysis; reversal is mandated only if the district court committed a clear or obvious error that affected substantial rights or was prejudicial. *See* *United States v. Banks*, 514 F.3d 959, 975-76 (9th Cir. 2008) (holding that argument must be same as that presented to the court below); *United States v. Sherwood*, 98 F.3d 402, 408 (9th Cir. 1996); *see also* *United States v. Varela-Rivera*, 279 F.3d 1174, 1177-78 (9th Cir. 2002) (noting circumstances that preserve

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[123] *See* *United States v. Freeman*, 498 F.3d 893, 901 (9th Cir. 2007) (combination lay and expert witness); *United States v. Salcido*, 506 F.3d 729, 732 (9th Cir. 2007); *United States v. Sutcliffe*, 505 F.3d 944, 958-59 (9th Cir. 2007) (not limiting purpose of evidence); *United States v. Hanna*, 293 F.3d 1080, 1085 (9th Cir. 2002) (officers as experts); *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) (customs officer as expert, discussing *Daubert*, *Joiner*, and *Kumho Tire*); *United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997) (drug trafficker modus operandi); *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988) (reversing district court's admission of criminal profiler testimony).

[124] *See* *United States v. Seschillie*, 310 F.3d 1208, 1211-12 (9th Cir. 2002) (shooting expert); *United States v. Johnson*, 297 F.3d 845, 862 (9th Cir. 2002) (sentencing guideline expert); *United States v. Campos*, 217 F.3d 707, 710 (9th Cir. 2000) (polygraph); *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000) (polygraph); *United States v. Scholl*, 166 F.3d 964, 971-72 (9th Cir. 1999) (accounting expert); *United States v. Morales*, 108 F.3d 1031, 1034 & n.1 (9th Cir. 1997) (en banc) (reversing court's exclusion of bookkeeping expert, noting review is for an abuse of discretion, not "manifest error").

defendant's right of review under abuse of discretion standard rather than plain error).

ii. Reliability

The district court has wide discretion in determining whether particular scientific tests are reliable enough to permit expert testimony based upon their results, and will be upheld unless manifestly erroneous. *See* *United States v. W.R. Grace*, 504 F.3d 745, 759 (9th Cir. 2007); *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002); *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988).

iii. Qualifications

The determination whether an expert witness has sufficient qualifications to testify is reviewed for an abuse of discretion. *See* *United States v. Redlightning*, 624 F.3d 1090, 1115 (9th Cir. 2010); *United States v. Abonce-Barrera*, 257 F.3d 959, 964 (9th Cir. 2001); *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000); *United States v. Garcia*, 7 F.3d 885, 889 (9th Cir. 1993).

iv. Funds/Expert Appointment Request

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. *See* *United States v. Smith*, 520 F.3d 1097, 1105 (9th Cir. 2008); *United States v. Rodriguez-Lara*, 421 F.3d 932, 939-40 (9th Cir. 2005).[125]

A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion that is reviewed for an abuse of discretion. *See* *United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000).

b. Lay Opinion Testimony

This court reviews for abuse of discretion a district court's admission of lay opinion testimony. *See* *United States v. Beck*, 418 F.3d 1008, 1013-15

[125] *See also* *United States v. Nelson*, 137 F.3d 1094, 1101 n.2 (9th Cir. 1998); *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996).

& n.3 (9th Cir. 2005) (holding that "a lay witness's testimony is rationally based within the meaning of Rule 701 where it is 'based upon personal observation and recollection of concrete facts.'").[126]

46. Photographs

A district court's ruling on the admission of photographs into evidence is reviewed for an abuse of discretion. *See United States v. Pineda-Doval*, 614 F.3d 1019, 1034 (9th Cir. 2010); *United States v. Campbell*, 42 F.3d 1199, 1204 (9th Cir. 1994); *United States v. Chambers*, 918 F.2d 1455, 1462 (9th Cir. 1990).

Permitting lay witness testimony regarding the identity of an individual depicted in a photograph is also reviewed for an abuse of discretion. *See United States v. Henderson*, 241 F.3d 638, 650-51 (9th Cir. 2000).

47. Presence of Defendant

A district court's denial of a defendant's motion to waive his or her presence at trial is reviewed for abuse of discretion. *See United States v. Lumitap*, 111 F.3d 81, 83 (9th Cir. 1997).

A district court's factual finding that a defendant has knowingly and voluntarily failed to appear for trial is reviewed for clear error. *See United States v. Houtchens*, 926 F.2d 824, 826 (9th Cir. 1991).

A defendant's absence from a "critical stage" of the trial is subject to harmless error review. *See United States v. Berger*, 473 F.3d 1080, 1094 (9th Cir. 2007) (noting government's burden to show harmlessness). Plain error applies when there is no objection. *See United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002).

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[126] *See also United States v. Martinez*, 657 F.3d 811, 818-19 (9th Cir. 2011); *United States v. Matsumaru*, 244 F.3d 1092, 1101 (9th Cir. 2001) (allowing lay testimony); *United States v. Holmes*, 229 F.3d 782, 788 (9th Cir. 2000) (same); *United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995) (noting this court has characterized the standard of review in different ways).

48. Prior Crimes, Wrongs or Acts

"We review for abuse of discretion the district court's decision to admit evidence of prior bad acts." *United States v. Mendoza-Prado*, 314 F.3d 1099, 1103 (9th Cir. 2002).

a. Fed. R. Evid. 404(b)

The district court's decision to admit evidence of prior crimes or bad acts pursuant to Fed. R. Evid. 404(b) is reviewed for an abuse of discretion under a four-part test. *See United States v. Flores-Blanco*, 623 F.3d 912, 919 (9th Cir. 2010); *see also United States v. Major*, 676 F.3d 803, 807-09 (9th Cir. 2012).[127]

Whether evidence falls within the scope of Rule 404(b) is a question of law reviewed de novo. *See United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002). For example, de novo review applies to whether such evidence is directly relevant to the crime charged or relevant only to "other crimes." *See United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999); *United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999); *United States v. Jackson*, 84 F.3d 1154, 1158-59 (9th Cir. 1996). De novo review also applies to whether certain conduct constitutes "other crimes." *See United States v. Serang*, 156 F.3d 910, 915 (9th Cir. 1998); *United States v. Andaverde*, 64 F.3d 1305, 1314 (9th Cir. 1995); *United States v. Kearns*, 61 F.3d 1422, 1427 (9th Cir. 1995); *United States v. Warren*, 25 F.3d 890, 895 (9th Cir. 1994).

In allowing Rule 404(b) evidence, a district court is not required to recite the corresponding Rule 403 balancing analysis; it is enough if the reviewing court can conclude, based on a review of the record, that the

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[127] *United States v. Rendon-Duarte*, 490 F.3d 1142, 1145 (9th Cir. 2007); *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1062 (9th Cir. 2004); *United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002); *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002); *United States v. Carrasco*, 257 F.3d 1045, 1048 (9th Cir. 2001); *United States v. Chea*, 231 F.3d 531, 534 (9th Cir. 2000); *United States v. Howell*, 231 F.3d 615, 628 (9th Cir. 2000); *United States v. Hicks*, 217 F.3d 1038, 1046 (9th Cir. 2000).

district court considered Rule 403's requirements. *See* *United States v. Cherer*, 513 F.3d 1150, 1159 (9th Cir. 2008).

b. Fed. R. Evid. 608

"Evidentiary rulings admitting evidence of prior criminal activity under Rule 608 are reviewed for an abuse of discretion." *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999).

c. Fed. R. Evid. 609

Admission of prior criminal activity pursuant to Fed. R. Evid. 609 (impeachment) is reviewed for an abuse of discretion under five-factor test. *See* *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004). This court reviews the district court's interpretation of Rule 609 de novo. *See* *United States v. Foster*, 227 F.3d 1096, 1099 (9th Cir. 2000).

De novo review applies to whether the use of prior crimes for purposes of sentencing enhancement, *see* *United v. Gallaher*, 275 F.3d 784, 790 (9th Cir. 2001),[128] and to whether a defendant is a career offender, *see* *United States v. Kovac*, 367 F.3d 1116, 1118 (9th Cir. 2004).

49. Privileges

a. Attorney-Client, Doctor-Patient, Marital

De novo review applies to the district court's attorney-client privilege determinations, *see* *United States v. Alexander*, 287 F.3d 811, 816 (9th Cir. 2002),[129] including rulings on the scope of the privilege, *see* *United States v.*

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[128] *See also* *United States v. Phillips*, 149 F.3d 1026, 1031 (9th Cir. 1998) (Armed Career Criminal Act); *United States v. Young*, 988 F.2d 1002, 1003 (9th Cir. 1993) (same).

[129] *See also* *United v. Martin*, 278 F.3d 988, 999-1000 (9th Cir. 2002) (explaining elements of privilege); *United States v. Wiseman*, 274 F.3d 1235, 1244 (9th Cir. 2001); *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995).

Mett, 178 F.3d 1058, 1061-62 (9th Cir. 1999),[130] and whether the privilege exists, *see* *In re Subpoena to Testify Before Grand Jury*, 39 F.3d 973, 976 (9th Cir. 1994).

An abuse of discretion standard applies to findings regarding the applicability of the marital privilege. *See* *United States v. Murphy*, 65 F.3d 758, 761 (9th Cir. 1995).

De novo review also exists for the scope of the doctor-patient privilege. *See* *United States v. Romo*, 413 F.3d 1044, 1046 (9th Cir. 2005) (psychotherapist-patient privilege); *United States v. Chase*, 340 F.3d 978, 981 (9th Cir. 2003) (en banc) (patient-doctor privilege).

An otherwise applicable privilege may be waived through voluntary disclosure; whether such waiver occurred is a mixed question of fact and law. *See* *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665, 667-68 (9th Cir. 2003) (marital privilege); *United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999) (attorney-client).[131]

Courts have discretion to fashion appropriate remedies whenever prosecutors subvert the attorney-client relationship. *See* *United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996).

The attorney-client privilege does not extend to "'communications which solicit or offer advice for the commission of a crime or fraud.'" *In re Grand Jury Subpoena 92 1(SJ)*, 31 F.3d 826, 829 (9th Cir. 1994). The standard of review of whether the government has made a prima facie showing that this "crime fraud" exception applies is unclear in this circuit – it is either de novo or an abuse of discretion. *See* *United States v. Bauer*, 132 F.3d 504, 509 n.3 (9th Cir. 1997); *In re Grand Jury Proceedings*, 87 F.3d 377, 380 (9th Cir. 1996).

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[130] *See also* *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997); *United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir. 1995) (describing scope of privilege as a mixed question of fact and law).

[131] *See also* *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997); *United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990).

b. Fifth Amendment/Defendant's Silence

De novo review applies to the district court's determinations regarding the scope of the Fifth Amendment privilege, *see* *United States v. Rubio-Topete*, 999 F.2d 1334, 1338 (9th Cir. 1993) (witness), whether a defendant's waiver of Fifth Amendment privilege was compelled, *see* *United States v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996), whether suppression of a defendant's testimony violates the constitutional right to testify, *see* *United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996), and whether there has been a violation of a defendant's Fifth Amendment right via references to the defendant's silence, *see* *United States v. Bohn*, 622 F.3d 1129, 1135 (9th Cir. 2010); *United States v. Lopez*, 500 F.3d 840, 844 (9th Cir. 2007); *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002).[132]

Prosecutors are forbidden from commenting on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1985).[133] *Griffin* claims are reviewed de novo. *See* *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002); *United States v. Mende*, 43 F.3d 1298, 1301 (9th Cir. 1995).

When a defendant fails to object to the admission of testimony or comments that may violate his Fifth Amendment privilege (or that may violate *Griffin*), review is limited to plain error. *See* *United States v. Thompson*, 82 F.3d 849, 854-55 (9th Cir. 1996).

When the defendant does object, harmless error applies. *See* *United States v. Velarde-Gomez*, 269 F.3d 1023, 1034-35 (9th Cir. 2001) (en banc) (*Griffin* case); *cf.* *United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011) (explaining where an objection to prosecutorial misconduct is raised in the trial court and overruled, review is for abuse of discretion).

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[132] *See also* *United States v. Hernandez*, 476 F.3d 791, 795-96 (9th Cir. 2007); *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002); *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc) (defendant's lack of a physical or emotional reaction).

[133] *See also* *United States v. Garcia-Guizar*, 160 F.3d 511, 522 (9th Cir. 1998); *United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996); *see also* *Cook v. Schriro*, 538 F.3d 1000, 1019 (9th Cir. 2008) (habeas).

50. Fed. R. Evid. 403 – Probative Value vs. Prejudicial Harm

The district court's balancing under Rule 403 of the probative value of evidence against its prejudicial effect is reviewed for an abuse of discretion. *See* *United States v. Mitchell*, 502 F.3d 931, 967-68 (9th Cir. 2007) (affirming); *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005) (reversing).[134] The district court need not, however, recite the Rule 403 test when deciding whether to admit evidence. *See* *United States v. Hicks*, 103 F.3d 837, 844 n.6 (9th Cir. 1996), *overruled in part on other grounds by* *United States v. W. R. Grace*, 526 F.3d 499, 502-03 (9th Cir. 2008). When the district court does not engage in explicit balancing of the probative value of the evidence against its prejudicial effect, its determination is reviewed de novo. *See* *United States v. Moran*, 493 F.3d 1002, 1012 (9th Cir. 2007). A district court abuses its discretion by not examining and evaluating all the evidence it must weigh. *See* *United States v. Curtin*, 489 F.3d 935, 958 (9th Cir. 2007) (en banc).

51. Prosecutorial Misconduct

a. Generally

The district court's rulings on alleged prosecutorial misconduct are reviewed for an abuse of discretion, *see* *United States v. Reyes*, 660 F.3d 454, 461 (9th Cir. 2011); *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002),[135] including the denial of a motion for new trial based on

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[134] *United States v. Allen*, 341 F.3d 870, 886 (9th Cir. 2003); *United States v. LeMay*, 260 F.3d 1018, 1024 (9th Cir. 2001) (discussing constitutional import of Rule 403); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Neill*, 166 F.3d 943, 946 (9th Cir. 1999) (finding harmless error); *United States v. Hicks*, 103 F.3d 837, 844 (9th Cir. 1996), *overruled in part on other grounds by* *United States v. W.R. Grace*, 526 F.3d 499, 513 (9th Cir. 2008) (en banc); *see also* *Old Chief v. United States*, 519 U.S. 172, 183 n.7 (1997) ("On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely on.").

[135] *See also* *United States v. Murillo*, 288 F.3d 1126, 1140 (9th Cir. 2002).

prosecutorial misconduct, *see* *United States v. Murillo*, 288 F.3d 1126, 1140 (9th Cir. 2002).[136]

Harmless error applies when defendant objects to prosecutorial misconduct, *see* *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1150 (9th Cir. 2012); *United States v. Blueford*, 312 F.3d 962, 973-74 (9th Cir. 2002), and plain error review applies when defendant fails to object, *see* *United States v. Geston*, 299 F.3d 1130, 1134 (9th Cir. 2002).

Trial courts have discretion to fashion an appropriate remedy when a prosecutor subverts the attorney-client relationship. *See* *United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996).

b. Bolstering/Vouching

Whether a prosecutor's comments constitute improper "bolstering" is a mixed question of law and fact reviewed de novo. *See* *United States v. Santiago*, 46 F.3d 885, 891 (9th Cir. 1995).

The Ninth Circuit has not been clear on the standard of review when the defendant timely objects to improper vouching. The approach has been to determine de novo whether the prosecutor's conduct constituted improper vouching, and if so, whether the vouching was harmless error. *See* *United States v. Sarkisian*, 197 F.3d 966, 989-90 (9th Cir. 1999).[137]

If there is no timely objection, vouching claims are reviewed for plain error. *See* *United States v. Doss*, 630 F.3d 1181, 1193 (9th Cir. 2011) (as

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[136] *See also* *United States v. Sarkisian*, 197 F.3d 966, 988 (9th Cir. 1999) (misconduct to be viewed in entirety of the trial); *United States v. Scholl*, 166 F.3d 964, 974 (9th Cir. 1999); *United States v. Peterson*, 140 F.3d 819, 821 (9th Cir. 1998); *United States v. Nelson*, 137 F.3d 1094, 1106 (9th Cir. 1998) (reciting defendant's burden as "showing that it is 'more probable than not that the misconduct materially affected the verdict'"); *United States v. Sayetsitty*, 107 F.3d 1405, 1408 (9th Cir. 1997).

[137] *United States v. Shaw*, 829 F.2d 714, 716-718 (9th Cir. 1987); *see also* *United States v. Hinton*, 31 F.3d 817, 824 (9th Cir. 1994) (harmless error standard).

amended); *United States v. Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007).[138] A district court commits plain error by allowing a prosecutor to persist in asking witnesses to comment upon the veracity of other witnesses. *See United States v. Geston*, 299 F.3d 1130, 1138 (9th Cir. 2002); *cf. United States v. Greer*, 640 F.3d 1011, 1023-24 (9th Cir. 2011) (distinguishing between asking whether another witness was "lying" or simply "mistaken").

c. Dismissal

The district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. *See United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011); *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003).[139] The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. *See United States v. Struckman*, 611 F.3d 560, 573 (9th Cir. 2010); *Gurolla*, 333 F.3d at 950; *United States v. Cuellar*, 96 F.3d 1179, 1182 (9th Cir. 1996).

d. Grand Jury Misconduct

Allegations of prosecutorial misconduct before a grand jury are reviewed de novo. *See United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004); *United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000).[140]

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[138] *See also United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Garcia-Guizar*, 160 F.3d 511, 516, 521 (9th Cir. 1998); *United States v. Rudberg*, 122 F.3d 1199, 1206 (9th Cir. 1997).

[139] *See also United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003); *United States v. Lazarevich*, 147 F.3d 1061, 1065 (9th Cir. 1998); *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996); *United States v. Wills*, 88 F.3d 704, 711 (9th Cir. 1996); *United States v. Dudden*, 65 F.3d 1461, 1466 (9th Cir. 1995).

[140] *See also United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986); *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1392 n.9 (9th Cir. 1983).

e. Disqualification of Prosecutor

A district court's refusal to disqualify the prosecutor is reviewed for an abuse of discretion. *See* *United States v. Davis*, 932 F.2d 752, 763 (9th Cir. 1991); *United States v. Plesinski*, 912 F.2d 1033, 1035 (9th Cir. 1990).

f. Suppression of Exculpatory Evidence

Whether the prosecutor has improperly suppressed exculpatory evidence is a question of law reviewed de novo. *See* *United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997); *see also* *United States v. Flyer*, 633 F.3d 911, 915-16 (9th Cir. 2011); *United States v. Estrada*, 453 F.3d 1208, 1212 (9th Cir. 2006). The district court's underlying factual findings are reviewed for clear error. *See* *Hernandez*, 109 F.3d at 1454. The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed for an abuse of discretion. *See* *United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992).

Where the claim is not presented to the district court, review is for plain error. *See* *United States v Houston*, 648 F.3d 806, 813 (9th Cir. 2011).

52. Rebuttal and Surrebuttal Evidence

Abuse of discretion review applies to a district court's decision regarding admission of rebuttal evidence,[141] order of proof,[142] proper scope of rebuttal,[143] and admission or exclusion of surrebuttal evidence.[144] *See* *United States v. Beck*, 418 F.3d 1008, 1016 n.6 (9th Cir. 2005) (admission of rebuttal evidence); *United States v. Goland*, 959 F.2d 1449, 1454 (9th Cir. 1992) (scope); *United States v. Blackstone*, 56 F.3d 1143, 1146 (9th Cir. 1995) (surrebuttal).

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[141] *See* *United States v. Antonakeas*, 255 F.3d 714, 724 (9th Cir. 2001).

[142] *See* Fed. R. Evid. 611(a); *Geders v. United States*, 425 U.S. 80, 86 (1976); *United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1993).

[143] *See* *Rent-A-Center v. Canyon Television & Appliance*, 944 F.2d 597, 601 (9th Cir. 1991).

[144] *See* *United States v. Butcher*, 926 F.2d 811, 817 (9th Cir. 1991).

53. Recess

A trial court's decision to recess during trial is reviewed for an abuse of discretion. *See* *United States v. Hay*, 122 F.3d 1233, 1235 (9th Cir. 1997) (holding that forty eight day recess between close of evidence and closing arguments is an abuse of discretion).

54. Recusal and Disqualification of Judge

A district court's decision whether to grant a motion for recusal, or to disqualify herself,[145] is reviewed for an abuse of discretion. *See* *United States v. Holland*, 519 F.3d 909, 912-13 (9th Cir. 2008) (noting that courts generally do not review a judge's decision to recuse himself or herself).[146]

When recusal is not raised below, or the defendant fails to object at trial, the allegation of judicial bias is reviewed for plain error. *See* *United States v. Morgan*, 376 F.3d 1002, 1007 (9th Cir. 2004).[147]

55. Relevancy of Evidence

The district court's decisions regarding the relevancy of evidence are reviewed for abuse of discretion. *See* *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004).[148] Note, however, that legal issues regarding

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[145] *See also* *United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997).

[146] *See also* *United States v. Sutcliffe*, 505 F.3d 944, 957-58 (9th Cir. 2007); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002); *United States v. Silver*, 245 F.3d 1075, 1078 (9th Cir. 2001); *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000); *United States v. Scholl*, 166 F.3d 964, 977 (9th Cir. 1999); *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997); *United States v. Eshkol*, 108 F.3d 1025, 1030 (9th Cir. 1997); *see also United States v. $292,888.04 in* *U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995) (civil forfeiture action).

[147] *See also* *United States v. Springer*, 51 F.3d 861, 864 n.1 (9th Cir. 1995); *United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991).

[148] *See also* *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (expert testimony); *United States v. Hicks*, 103 F.3d 837, 843 (9th Cir. 1996), *overruled in part on other grounds by* *United States v. W.R. Grace*, 526 F.3d 499, 503 (9th Cir. 2008) (en banc); *United States v. Easter*, 66 F.3d 1018, 1020 (9th Cir. 1995); *United States v. Kallin*, 50 F.3d 689, 693 (9th

whether evidence is relevant to other acts or to the crime charged is reviewed de novo. *See* *United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999).[149]

56. Reopening

Abuse of discretion standard applies to the district court's decision whether to reopen a case[150] or a suppression hearing.[151] *See* *United States v. Pino-Noriega*, 189 F.3d 1089, 1094 (9th Cir. 1999).

57. Rule of Completeness

The trial judge's decision to admit evidence pursuant to the rule of completeness is reviewed for an abuse of discretion. *See* *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996); *United States v. Dorrell*, 758 F.2d 427, 434 (9th Cir. 1985).

58. Sanctions

Discovery sanctions are generally reviewed for an abuse of discretion, *see* *United States v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir. 2000),[152] including the decision to exclude evidence as a sanction for destroying or failing to preserve evidence, *see* *United States v. Rivera-Relle*, 333 F.3d 914, 922 (9th Cir. 2003).

The applicability of Federal Rules and local rules,[153] however, is reviewed de novo,[154] but once sanctions are imposed, their propriety is

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Cir. 1995) (Rule 402); *United States v. Vaandering*, 50 F.3d 696, 704 (9th Cir. 1995).

[149] *See also* *United States v. Hardy*, 289 F.3d 608, 612 (9th Cir. 2002); *United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999) (Rule 404(b)); *United States v. Keiser*, 57 F.3d 847, 852 n.6 (9th Cir. 1995).

[150] *See, e.g.*, *United States v. Simtob*, 901 F.2d 799, 804 (9th Cir. 1990).

[151] *See, e.g.*, *United States v. Jordan*, 291 F.3d 1091, 1100 (9th Cir. 2002) (no abuse of discretion); *United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

[152] *See also* *United States v. Scholl*, 166 F.3d 964, 972 (9th Cir. 1999).

[153] *See* *United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting apparent unresolved question of what standard of review applies to

reviewed for an abuse of discretion. *See* *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002).[155]

The district court's findings of fact in support of its imposition of sanctions are reviewed for clear error. *See* *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993).

To reverse a conviction for a discovery violation, this court must determine not only that the district court abused its discretion, but that the error resulted in prejudice to substantial rights. *See* *United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007).[156]

The trial court's decision to impose sanctions for a Jencks Act violation is reviewed for an abuse of discretion. *See* *United States v. McKoy*, 78 F.3d 446, 449 (9th Cir. 1996).

59. Shackling

The district court's decision to shackle a defendant, or to impose other security measures,[157] is reviewed for an abuse of discretion. *See* *United States v. Collins*, 109 F.3d 1413, 1417 (9th Cir. 1997).[158] The underlying

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sanctions for violation of local rules); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993) ("We review de novo the district court's conclusion that specific conduct violated court rules.").

[154] *See* *United States v. Cedano-Arellano*, 332 F.3d 568, 571 (9th Cir. 2003) (de novo review of interpretation of discovery rule); *United States v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir. 2000).

[155] *See also* *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) ("We review de novo the question whether the district court had any legal basis for its discovery order. If it did, we review for an abuse of discretion the court's choice of a sanction for a violation of its order."); *United States v. Mandel*, 914 F.2d 1215, 1218 (9th Cir. 1990); *United States v. Iglesias*, 881 F.2d 1519, 1523 (9th Cir. 1989).

[156] *See also* *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997); *United States v. de Cruz*, 82 F.3d 856, 866 (9th Cir. 1996).

[157] *See* *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (limiting audience seating).

[158] *See also* *Morgan v. Bunnell*, 24 F.3d 49, 51 (9th Cir. 1994) (per curiam); *Jones v. Meyer*, 899 F.2d 883, 884 (9th Cir. 1990).

factual findings are reviewed for clear error. *See* *Spain v. Rushen*, 883 F.2d 712, 717 (9th Cir. 1989).

60. Side-Bar Conferences

The judge's decision whether to conduct a side-bar conference is reviewed for an abuse of discretion. *See* *United States v. Bennett*, 363 F.3d 947, 952 (9th Cir. 2004).[159]

61. Witnesses

a. District Court Decisions

The trial court's decisions regarding witnesses are generally reviewed for an abuse of discretion. For example:

- Issues regarding the court's control over the questioning of witnesses at trial. *See* *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002) (limiting cross-examination).[160]
- Decision to exclude witnesses from the courtroom. *See* *United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002).
- Imposition of a sanction for a violation of a witness sequestration order. *See* *United States v. English*, 92 F.3d 909, 913 (9th Cir. 1996). Note that if there is no contemporaneous objection, however, plain error review applies. *See* *United States v. Hobbs*, 31 F.3d 918, 921 (9th Cir. 1994).
- Whether a witness is "unavailable" to testify. *See* *United States v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002).

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[159] *See also* *United States v. Laurins*, 857 F.2d 529, 538 (9th Cir. 1988); *United States v. Wellington*, 754 F.2d 1457, 1469 (9th Cir. 1985).

[160] *See, e.g.*, *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002) (limiting cross-examination); *United States v. Pearson*, 274 F.3d 1225, 1233 (9th Cir. 2001) (disallowing leading questions); *United States v. Archdale*, 229 F.3d 861, 865 (9th Cir. 2000) (permitting leading questions); *United States v. Hay*, 122 F.3d 1233, 1235 (9th Cir. 1997) (limiting defendant's testimony); *United States v. Rutgard*, 116 F.3d 1270, 1279 (9th Cir. 1997) (imposing time restraints on examination of witnesses).

- Refusal to allow witness testimony on remand. *See United States v. Ross*, 372 F.3d 1097, 1112 (9th Cir. 2004).
- Grant of an exception to the witness disclosure requirements of Fed. R. Crim. P. 12.1(e). *See United States v. Wills*, 88 F.3d 704, 708 (9th Cir. 1996).
- Refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify. *See United States v. Smith*, 924 F.2d 889, 896 (9th Cir. 1991).
- Denial of a motion to produce witness statements. *See United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997).

A defendant's failure to object limits review to plain error. *See United States v. Shwayder*, 312 F.3d 1109, 1120 (9th Cir. 2002) (prosecutor's use of guilt-assuming hypotheticals during cross-examination), *amended by* 320 F.3d 889 (9th Cir. 2003). Note that a trial judge has broad discretion in supervising the trial and may participate in the examination of witnesses to clarify issues and call the jury's attention to important evidence. *See United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997); *United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994); *see also United States v. Moorehead*, 57 F.3d 875, 878 (9th Cir. 1995) ("[Defendant] does not dispute the broad authority of the district court to examine witnesses.").

Other witness determinations are reviewed de novo, such as the denial of a motion to dismiss an indictment for the government's failure to retain witnesses. *See United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002). Note that the district court's underlying factual determinations are reviewed for clear error. *See id.* The district court's interpretation of the witness tampering provisions of 18 U.S.C. § 1512(b) is also reviewed de novo. *See United States v. Khatami*, 280 F.3d 907, 910 (9th Cir. 2002).

b. Witness Immunity

The decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch. *See United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984).

Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether

the government has breached the agreement is a question of law reviewed de novo. *See* *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995).

Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. *See* *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999).

Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. *See* *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). Underlying factual findings are reviewed for clear error. *See* *id.*

D. Post-Trial Decisions in Criminal Cases

1. Allocution

The court's failure to allow a defendant his or her right of allocution is reviewed to determine if the error is harmless. *See* *United States v. Marks*, 530 F.3d 799, 813 (9th Cir. 2008); *United States v. Mack*, 200 F.3d 653, 657 (9th Cir. 2000).[161] The denial of allocution is not harmless when the district court has the discretion to sentence the defendant to a shorter sentence than given. *See* *Mack*, 200 F.3d at 657.[162]

2. Appeals

De novo review applies to whether a defendant has waived the statutory right to appeal by entering into a plea agreement, *see* *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010),[163] and to whether the

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[161] *See also* *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997); *United States v. Carper*, 24 F.3d 1157, 1162 (9th Cir. 1994) (finding error not harmless).

[162] *See also* *United States v. Sarno*, 73 F.3d 1470, 1503-04 (9th Cir. 1995) (reversing sentence).

[163] *See also* *United States v. Cope*, 527 F.3d 944, 949 (9th Cir. 2008);*United States v. Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005); *United States v. Bynum*, 362 F.3d 574, 583 (9th Cir. 2004); *United States v. Joyce*, 357 F.3d 921, 922 (9th Cir. 2004); *United States v. Shimoda*, 334 F.3d 846, 848 (9th Cir. 2003); *United States v. Nunez*, 223 F.3d 956, 958

waiver is valid, *see* *United States v. Littlejohn*, 224 F.3d 960, 964 (9th Cir. 2000).[164]

A district court's determination whether a defendant has shown excusable neglect in failing to file a timely notice of appeal is reviewed for an abuse of discretion. *See* *United States v. Green*, 89 F.3d 657, 660 (9th Cir. 1996); *United States v. Smith*, 60 F.3d 595, 596-97 (9th Cir. 1995).

A district court's order granting a party an extension of time to file a notice of appeal is reviewed for an abuse of discretion. *See* *Mendez v. Knowles*, 556 F.3d 757, 764 (9th Cir. 2009); *United States v. Garcia*, 997 F.2d 1273, 1276 n.1 (9th Cir. 1993).

3. *Apprendi* Violations

De novo review applies to a claim that a defendant's sentence violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *see* *United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1092 (9th Cir. 2007),[165] whether the district court correctly applied *Apprendi* at sentencing, *United States v. Banuelos*, 322 F.3d 700, 704 (9th Cir. 2003),[166] and the district court's interpretation of the

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(9th Cir. 2000) ("'Generally, courts will enforce a defendant's waiver of his right to appeal if (1) the language of the waiver encompasses the defendant's right to appeal on the grounds claimed on appeal, and (2) the waiver is knowingly and voluntarily made.'"); *United States v. Phillips*, 174 F.3d 1074, 1075 (9th Cir. 1999) (holding that no waiver existed due to ambiguous plea agreement); *United States v. Buchanan*, 59 F.3d 914, 918 (9th Cir. 1995) (plea agreement waiver not controlling in light of court's oral assurances of appeal).

[164] *See also* *United States v. Garza-Sanchez*, 217 F.3d 806, 808 (9th Cir. 2000) (deportation order); *United States v. Portillo-Cano*, 192 F.3d 1246, 1249 (9th Cir. 1999) (finding no waiver, vacating conviction); *United States v. Aguilar-Muniz*, 156 F.3d 974, 976 (9th Cir. 1998); *United States v. Zink*, 107 F.3d 716, 717 (9th Cir. 1997) (finding no waiver).

[165] *See also* *United States v. Valle-Montalbo*, 474 F.3d 1197, 1199 (9th Cir. 2007); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1093 (9th Cir. 2006) (applying plain error); *United States v. Pina-Jaime*, 332 F.3d 609, 611 (9th Cir. 2003); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002) (*Apprendi* does not apply to criminal history).

[166] *See also* *United States v. Gill*, 280 F.3d 923, 928 (9th Cir. 2002).

constitutional rule in *Apprendi*. *See* *United States v. Maria-Gonzalez*, 268 F.3d 664, 667 (9th Cir. 2001).

Apprendi violations are subject to harmless error review. *See* *United States v. Hunt*, 656 F.3d 906, 913-14 (9th Cir. 2011); *United States v. Valle-Montalbo*, 474 F.3d 1197, 1201-02 (9th Cir. 2006).

A defendant's failure, however, to raise an *Apprendi* claim before the district court limits appellate review to plain error. *See* *United States v. Covian-Sandoval*, 462 F.3d 1090, 1093 (9th Cir. 2006).[167]

Note that *Apprendi* is not structural, nor is it to be applied retroactively. *See* *United States v. Sanchez-Cervantes*, 282 F.3d 664, 670-71 (9th Cir. 2002).

4. Arrest of Judgment

The district court's denial of a motion for arrest of judgment is reviewed for an abuse of discretion. *See* *United States v. Rodriguez*, 360 F.3d 949, 955 (9th Cir. 2004); *United States v. Baker*, 63 F.3d 1478, 1499 (9th Cir. 1995).

5. Attorneys' Fees

The award[168] or denial[169] of attorneys' fees pursuant to 18 U.S.C. § 3006A (Hyde Amendment) are reviewed for an abuse of discretion. *See* *United States v. Danielson*, 325 F.3d 1054, 1076 (9th Cir. 2003).

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[167] *See also* *United States v. Sua*, 307 F.3d 1150, 1154 (9th Cir. 2002); *United States v. Buckland*, 289 F.3d 558, 563 (9th Cir. 2002) (en banc) (finding any error harmless); *United States v. Rodriguez*, 285 F.3d 759, 763 (9th Cir. 2002) (vacating sentence); *United States v. Johansson*, 249 F.3d 848, 861 (9th Cir. 2001) (no error if fact used to increase sentence within statutory maximum).

[168] *See* *United States v. Sherburne*, 506 F.3d 1187, 1190 (9th Cir. 2007) (reversing reward); *United States v. Braunstein*, 281 F.3d 982, 992 (9th Cir. 2002).

[169] *See* *United States v. Chapman*, 524 F.3d 1073, 1089-90 (9th Cir. 2008) (construing "prevailing party"); *United States v. Danielson*, 325 F.3d 1054, 1076 (9th Cir. 2003); *United States v. Campbell*, 291 F.3d 1169, 1170

6. Bail Pending Sentence and Appeal

Post trial release is governed by the standards set forth in 18 U.S.C. § 3143, Fed. R. Crim. P. 46, and Fed. R. App. P. 9. This circuit has not established a standard of review of a district court's denial of release. However, the court has laid out the requirements for bail pending appeal. *See United States v. Handy*, 761 F.2d 1279, 1283-84 (9th Cir. 1985); *United States v. Montoya*, 908 F.2d 450, 450 (9th Cir. 1990). Findings by the trial court whether a defendant is likely to flee or pose a danger to the safety of the community are likely reviewed for clear error. *See Handy*, 761 F.2d at 1283; *United States v. Reynolds*, 956 F.2d 192, 192 (9th Cir. 1992) (order). Other circuits are split.[170]

When a district court refuses release pending appeal or imposes conditions of release, the court must state in writing the reasons for the action taken. Fed. R. App. P. 9(b). The district court satisfies this requirement by issuing written findings or by stating the reasons for the decision orally and providing a transcript. *See United States v. Cordero*, 992 F.2d 985, 986 n.1 (9th Cir. 1993). Absent written findings or a transcript of the bail hearing, remand is required. *See id.*

The district court's denial of a motion for relief from bond forfeiture is reviewed for an abuse of discretion. *See United States v. Nguyen*, 279 F.3d 1112, 1115 (9th Cir. 2002); *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 602 (9th Cir. 1995).

(9th Cir. 2002); *United States v. Tucor Int'l, Inc.*, 238 F.3d 1171, 1175 (9th Cir. 2001) ("The district court abuses its discretion when it makes an error of law, or bases its conclusion on a clearly erroneous finding of fact.") (citation omitted); *United States v. Lindberg*, 220 F.3d 1120, 1124 (9th Cir. 2000) (comparing EAJA standard).

[170] *See United States v. Barnes*, 324 F.3d 135, 140 (3d Cir. 2003) ("plenary"); *United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2001) (abuse of discretion); *United States v. Mercedes*, 254 F.3d 433, 435 (2d Cir. 2001) (per curiam) (clear error); *United States v. Eaken*, 995 F.2d 740, 741 (7th Cir. 1993) (de novo); *United States v. Bayko*, 774 F.2d 516, 519 (1st Cir. 1985) ("independent").

7. Correcting/Amending/Reducing Sentences

Fed. R. Crim. P. 35(c) permits corrections of sentences that are clearly erroneous under the Sentencing Guidelines. *See* *United States v. Aguirre*, 214 F.3d 1122, 1126 (9th Cir. 2000).

De novo review applies to issues of law raised in a Rule 35(c) motion,[171] and whether a court has jurisdiction under Rule 35(c) to resentence.[172] *See* *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003). Note that a district court's decision under Rule 35 involving pre-November 1, 1987 conduct is "reviewed for illegality or gross abuse of discretion." *United States v. Hovsepian*, 359 F.3d 1144, 1153 (9th Cir. 2004) (en banc); *United States v. Hayes*, 231 F.3d 1132, 1135 (9th Cir. 2000).

Abuse of discretion review applies to a trial court's decision whether to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range), and the denial a motion to amend a guideline sentence. *See* *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009); *United States v. Hurt*, 345 F.3d 1033, 1035 (9th Cir. 2003).[173]

8. Disciplinary Orders

Terms and conditions of a disciplinary order are reviewed for abuse of discretion. *See* *United States v. Engstrom*, 16 F.3d 1006, 1011 (9th Cir. 1994).

9. Expungement

This court reviews de novo whether a district court has the authority to order expungement of a record of conviction. *See* *United States v.*

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[171] *See* *United States v. Zakhor*, 58 F.3d 464, 465 (9th Cir. 1995) (challenging application and constitutionality of Sentencing Reform Act).

[172] *See* *United States v. Aguirre*, 214 F.3d 1122, 1124 (9th Cir. 2000) (vacating resentence); *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999) (vacating resentence).

[173] *See also* *United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998); *United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996) (per curiam).

Crowell, 374 F.3d 790, 792 (9th Cir. 2004); *United States v. Sumner*, 226 F.3d 1005, 1009 (9th Cir. 2000).

10. Fines

The district court's determination that a defendant has the ability to pay a fine is a finding of fact reviewed for clear error. *See United States v. Rearden*, 349 F.3d 608, 617 (9th Cir. 2003).[174]

De novo review applies to the legality, *see United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002), and constitutionality of a fine, *see United States v. Bajakajian*, 524 U.S. 321, 336 & n.10 (1998). The court also reviews de novo whether a district court has the authority to modify a fine. *See United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000).

11. Forfeiture

De novo review applies to the following:

- District court's interpretation of the federal forfeiture laws. *See United States v. $493,850.00 in U.S. Currency*, 518 F.3d 1159, 1164 (9th Cir. 2008).[175]

- Whether there is standing to contest a forfeiture action. *See United States v. Real Property Located at 475 Martin Lane*, 545 F.3d 1134, 1140 (9th Cir. 2008).

- Whether a delay in the initiation of civil forfeiture proceedings is unconstitutional. *See United States v. Approximately $1.67 Million in U.S. Currency, Stock, & Other Valuable Assets*, 513 F.3d 991, 1001 (9th Cir. 2008); *United States v. $292,888.04 in*

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[174] *United States v. Sager*, 227 F.3d 1138, 1147 (9th Cir. 2000); *United States v. Scrivener*, 189 F.3d 944, 953 (9th Cir. 1999); *see also United States v. Ganoe*, 538 F.3d 1117, 1128 (9th Cir. 2008).

[175] *See also United States v. $46,588.00 in U.S. Currency and $20.00 in Canadian Currency*, 103 F.3d 902, 903 (9th Cir. 1996); *United States v. Kim*, 94 F.3d 1247, 1249 (9th Cir. 1996); *United States v. 1980 Lear Jet*, 38 F.3d 398, 400 (9th Cir. 1994) (reversing).

U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995) (no probable cause).

- Determinations of probable cause in civil forfeiture proceedings. *See United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942, 949 (9th Cir. 2010) (as amended); *$493,850.00*, 518 F.3d at 1164.[176]

- Whether a civil forfeiture is "grossly disproportional" to the gravity of the defendant's crime. *See United States v. $100,348 in U.S. Currency*, 354 F.3d 1110, 1121 (9th Cir. 2004).

"However, [the appellate court] must accept the district court's findings of fact in conducting the excessiveness inquiry unless they are clearly erroneous." *$100,348 in U.S. Currency*, 354 F.3d at 1121.

12. Mistrial

The district court's denial of a motion for mistrial is reviewed for an abuse of discretion. *See United States v. Chapman*, 524 F.3d 1073, 1081-82 (9th Cir. 2008) (manifest discretion, noting a varying deference depending upon the circumstances).[177] Note, however, that the district court's denial of

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[176] *See, e.g.*, *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 868 (9th Cir. 2001); *United States v. $129,727.00 U.S. Currency*, 129 F.3d 486, 489 (9th Cir. 1997); *United States v. $405,089.23 U.S. Currency*, 122 F.3d 1285, 1289 (9th Cir. 1997) (reversing probable cause); *United States v. One 1986 Ford Pickup*, 56 F.3d 1181, 1186 (9th Cir. 1995) (reviewing certificate of reasonable cause); *United States v. U.S. Currency, $30,060*, 39 F.3d 1039, 1041 (9th Cir. 1994).

[177] *See also, e.g.*, *United States v. Washington*, 462 F.3d 1124, 1136 (9th Cir. 2006) (prosecutorial misconduct); *United States v. Hagege*, 437 F.3d 943, 959-60 (9th Cir. 2006); *United States v. Allen*, 341 F.3d 870, 891 (9th Cir. 2003) (prejudicial testimony); *United States v. McCormac*, 309 F.3d 623, 626 (9th Cir. 2002) (contempt); *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002) (prosecutorial misconduct); *United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002) (juror misconduct); *United States v. Sarkisian*, 197 F.3d 966, 981 (9th Cir. 1999) (extraneous information to jury); *United States v. Ramirez*, 176 F.3d 1179, 1183 (9th Cir. 1999) (misstatements at closing); *United States v. Randall*, 162 F.3d 557, 559 (9th Cir. 1998)

a mistrial based on *Brady* violations is reviewed do novo. *See* *United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000). A district court's failure to declare mistrial sua sponte after the defendant withdraws a motion for a mistrial is reviewed for plain error. *See* *United States v. Banks*, 514 F.3d 959, 973-74 (9th Cir. 2008).

13. New Trial

The denial of a defendant's motion for a new trial is reviewed for an abuse of discretion. *See* *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011); *United States v. Moses*, 496 F.3d 984, 992-93 (9th Cir. 2007).[178] This includes the following:

- Motions based on newly discovered evidence. *See* *United States v. Hinkson*, 585 F3d 1247, 1259 (9th Cir. 2009) (en banc) (Rule 33 motion).[179]
- Motions based on alleged prosecutorial misconduct. *See* *United States v. Washington*, 462 F.3d 1124, 1135 (9th Cir. 2006) (finding error harmless).[180]

(cautionary instruction); *United States v. Nelson*, 137 F.3d 1094, 1106 (9th Cir. 1998) (improper questions); *United States v. English*, 92 F.3d 909, 912 (9th Cir. 1996) (emotional testimony); *United States v. Wills*, 88 F.3d 704, 712 (9th Cir. 1996) (statement about polygraph); *United States v. Frederick*, 78 F.3d 1370, 1375 (9th Cir. 1996) (prejudicial testimony); *United States v. George*, 56 F.3d 1078, 1082 (9th Cir. 1995) (inadmissible hearsay).

[178] *See, e.g.*, *United States v. Mack*, 362 F.3d 597, 600 (9th Cir. 2004) (reversing for a new trial); *United States v. Hursh*, 217 F.3d 761, 769 (9th Cir. 2000); *United States v. Jackson*, 209 F.3d 1103, 1106 (9th Cir. 2000) (28 U.S.C. § 2255 "motion"); *United States v. Endicott*, 869 F.2d 452, 454 (9th Cir. 1989) ("[T]he defendant carries a 'significant burden' to show that the district court abused its discretion in denying a new trial.").

[179] *See also* *United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003); *United States v. Sarno*, 73 F.3d 1470, 1507 (9th Cir. 1995); *United States v. Bischel*, 61 F.3d 1429, 1436 (9th Cir. 1995); *United States v. Reyes Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992).

[180] *See also* *United States v. Murillo*, 288 F.3d 1126, 1140 (9th Cir. 2002) (finding error harmless beyond reasonable doubt); *United States v. Peterson*,

- Motions based on alleged juror misconduct. *See* *United States v. Murphy*, 483 F.3d 639, 642 (9th Cir. 2007); *United States v. Bussell*, 414 F.3d 1048, 1054 (9th Cir. 2005).[181]
- District court's decision not to hold an evidentiary hearing. *See* *Bussell*, 414 F.3d at 1054; *see also* *United States v. Del Muro*, 87 F.3d 1078, 1080 n.3 (9th Cir. 1996).

The decision to grant a new trial based on a claim that jurors were improperly exposed to extrinsic evidence is subject, however, to "independent" review. *See* *United States v. Prime*, 431 F.3d 1147, 1157 (9th Cir. 2005); *United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998). Note that the presence of a biased juror cannot be harmless and requires a new trial without a showing of prejudice. *See* *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002).

This court has also stated that de novo review applies to the denial of motions for a new trial based on a *Brady* violation, *see* *United States v. Pelisamen*, 641 F.3d 399, 408 (9th Cir. 2011); *United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000), or one based on a theory of entrapment, *see* *United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997).

14. Parole

The legality of a sentence and its impact on parole are issues reviewed de novo. *See* *United States v. Carpenter*, 91 F.3d 1282, 1283 (9th Cir. 1996) (per curiam), *implied overruling on other grounds recognized by* *United States v. Broussard*, 611 F.3d 1069 (9th Cir. 2010); *United States v. Manning*, 56 F.3d 1188, 1200 (9th Cir. 1995).

Whether a parole or probation officer is acting as a "stalking horse" is a question of fact reviewed for clear error. *See* *United States v. Vought*, 69 F.3d 1498, 1501 (9th Cir. 1995).

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140 F.3d 819, 821 (9th Cir. 1998) (prosecutorial misconduct, reversing for new trial); *United States v. Sayetsitty*, 107 F.3d 1405, 1408 (9th Cir. 1997).

[181] *See also* *United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002); *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001); *United States v. George*, 56 F.3d 1078, 1083 (9th Cir. 1995).

This court reviews the Parole Commission's interpretations of law de novo and its factual findings for clear error. *See* *Kleeman v. United States Parole Comm'n*, 125 F.3d 725, 730 (9th Cir. 1997). The Commissioner's discretionary decisions to grant or deny parole are not reviewable by this court except for the claim that "the Commission acted beyond the scope of discretion granted by Congress." *DeLancy v. Crabtree*, 131 F.3d 780, 787 (9th Cir. 1997) (internal quotation omitted).[182]

15. Probation

A district court may lack discretion to impose probation as a sentence. *See* *United States v. Green*, 105 F.3d 1321, 1323 (9th Cir. 1997); *United States v. Roth*, 32 F.3d 437, 440 (9th Cir. 1994). If probation is available, the "task of line drawing in probation matters is best left to the discretion of the sentencing judge." *United States v. Juvenile #1*, 38 F.3d 470, 473 (9th Cir. 1994) (internal quotation omitted).

Abuse of discretion review applies to the following:

- Decision to revoke probation or supervised release. *See* *United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011); *United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Shampang*, 987 F.2d 1439, 1441 (9th Cir. 1993).[183]
- The choice of conditions of probation. *See* *United States v. Juvenile #1*, 38 F.3d 470, 473 (9th Cir. 1994).[184]
- The decision not to conduct an in camera inspection of probation files pursuant to defendant's discovery request. *See* *United States v. Alvarez*, 358 F.3d 1194, 1208 (9th Cir. 2004).

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[182] *See also* *Benny v. United States Parole Comm'n*, 295 F.3d 977, 981 (9th Cir. 2002) (noting review is limited to "whether the Commission exceeded its authority or acted so arbitrarily as to violate due process").

[183] *See also* *United States v. Laughlin*, 933 F.2d 786, 788 (9th Cir. 1991); *United States v. Tham*, 884 F.2d 1262, 1263 (9th Cir. 1989).

[184] *See also* *United States v. Parrott*, 992 F.2d 914, 920 (9th Cir. 1993) (noting review is de novo if defendant challenges the court's authority to impose condition); *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988) (noting district court has "broad discretion in setting probation conditions").

De novo review applies to the following:

- Challenges to the district court's authority to impose specific probation conditions. *See* *United States v. Baker*, 658 F.3d 1050, 1053 (9th Cir. 2011); *United States v. Parrott*, 992 F.2d 914, 920 (9th Cir. 1993).
- Whether a district court can properly delegate authority to a magistrate judge to conduct a probation revocation hearing. *See* *United States v. Colacurcio*, 84 F.3d 326, 328 (9th Cir. 1996).
- Whether a probation officer exceeds her statutory authority by submitting a petition on supervised release to the district court. *See* *United States v. Mejia-Sanchez*, 172 F.3d 1172, 1174 (9th Cir. 1999).
- Whether a district court may reinstate an original term of supervised release. *See* *United States v. Trenter*, 201 F.3d 1262, 1263 (9th Cir. 2000).
- The district court's interpretation and application of the supervised release statute. *See* *United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011); *United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Cade*, 236 F.3d 463, 465 (9th Cir. 2000).

16. Resentencing

De novo review applies to whether a court has jurisdiction to resentence a defendant,[185] whether double jeopardy bars resentencing,[186] and whether resentencing violates a defendant's due process rights.[187] *See*

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[185] *See* *United States v. Cabaccang*, 481 F.3d 1176, 1182 (9th Cir. 2007); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003); *United States v. Aguirre*, 214 F.3d 1122, 1124 (9th Cir. 2000) (vacating sentence); *United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1184 (9th Cir. 2000); *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999) (vacating sentence).

[186] *See* *United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1185 (9th Cir. 2000); *United States v. McClain*, 133 F.3d 1191, 1193 (9th Cir. 1998) (habeas).

[187] *See* *United States v. Garcia-Guizar*, 234 F.3d 483, 489 n.2 (9th Cir. 2000).

United States v. Aguilar-Reyes, 653 F.3d 1053, 1055 (9th Cir. 2011) (jurisdiction); *United States v. Dowd*, 417 F.3d 1080, 1086 (9th Cir. 2005) (due process rights); *United States v. Radmall*, 340 F.3d 798, 800 n.4 (9th Cir. 2003) (double jeopardy). Note that generally a district court's discretion on remand to resentence a defendant is not limited to the prior record. *See United States v. Matthews*, 278 F.3d 880, 885 (9th Cir. 2002) (en banc); *United States v. Luong*, 627 F.3d 1306, 1309 (9th Cir. 2010).[188]

17. Restitution

A restitution order is reviewed for an abuse of discretion, provided that it is within the bounds of the statutory framework. *See United States v. Brock-Davis*, 504 F.3d 991, 996 (9th Cir. 2007).[189] When the restitution order is not challenged before the district court, review is limited to plain error. *See United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004).[190]

A court has broad discretion in ordering restitution,[191] and the amount of restitution ordered is reviewed for an abuse of discretion. *See United*

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[188] *See also United States v. Culps*, 300 F.3d 1069, 1082 (9th Cir. 2002) (discussing certain cases where we may limit the discretion of the district court to consider new evidence).

[189] *See also United States v. Doe*, 488 F.3d 1154, 1160-61 (9th Cir. 2007); *United States v. Berger*, 473 F.3d 1080, 1104 (9th. Cir. 2007); *United States v. Cienfuegos*, 462 F.3d 1160, 1162 (9th Cir. 2006); *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. De La Fuente*, 353 F.3d 766, 772 (9th Cir. 2003); *United States v. Riley*, 335 F.3d 919, 931 (9th Cir. 2003); *United States v. Grice*, 319 F.3d 1174, 1176 (9th Cir. 2003) (per curiam); *United States v. Pizzichiello*, 272 F.3d 1232, 1240 (9th Cir. 2001).

[190] *See also United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003); *United States v. Zink*, 107 F.3d 716, 718 (9th Cir. 1997); *see also United States v. Fu Sheng Ko*, 620 F.3d 1158, 1162 (9th Cir. 2010) (reviewing valuation method for plain error where not challenged in district court).

[191] *See United States v. Berger*, 473 F.3d 1080, 1104 (9th Cir. 2007); *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999); *United States v. Miguel*, 49 F.3d 505, 511 (9th Cir. 1995).

States v. Phillips, 367 F.3d 846, 854 (9th Cir. 2004).[192] The court's "valuation methodology" is reviewed, however, de novo. *See* *United States v. Berger*, 473 F.3d 1080, 104 (9th Cir. 2007).

Factual findings supporting a restitution order are reviewed for clear error. *See* *United States v. Brock-Davis*, 504 F.3d 991, 996 (9th Cir. 2007).[193]

The legality of a restitution order, however, is reviewed de novo. *See* *Brock-Davis*, 504 F.3d at 996; *United States v. Cienfuegos*, 462 F.3d 1160, 1162 (9th Cir. 2006).[194]

18. Fed. R. Crim. P. 32

The sentencing court's compliance with Fed. R. Crim. P. 32 is reviewed de novo. *See* *United States v. Burkholder*, 590 F.3d 1071, 1076 (9th Cir. 2010); *United States v. Stoterau*, 524 F.3d 988, 1011 (9th Cir. 2008).[195]

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[192] *See also* *United States v. Najjor*, 255 F.3d 979, 984 (9th Cir. 2001) (remand for recalculation of restitution); *United States v. Matsumaru*, 244 F.3d 1092, 1108 (9th Cir. 2001) (same); *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999); *United States v. Johnson*, 132 F.3d 1279, 1286 (9th Cir. 1997); *United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996) (reversing for recalculation of restitution).

[193] *See also* *United States v. Cienfuegos*, 462 F.3d 1160, 1162 (9th Cir. 2006); *United States v. De La Fuente*, 353 F.3d 766, 772 (9th Cir. 2003); *United States v. Pizzichiello*, 272 F.3d 1232, 1240 (9th Cir. 2001); *United States v. Allen*, 153 F.3d 1037, 1044-45 (9th Cir. 1998).

[194] *See also* *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. Cliatt*, 338 F.3d 1089, 1090 (9th Cir. 2003); *United States v. Grice*, 319 F.3d 1174, 1176 (9th Cir. 2003) (per curiam); *United States v. Pizzichiello*, 272 F.3d 1232, 1240 (9th Cir. 2001); *United States v. Follet*, 269 F.3d 996, 998 (9th Cir. 2001) (reversing); *United States v. Laney*, 189 F.3d 954, 964-65 (9th Cir. 1999).

[195] *See also* *United States v. Saeteurn*, 504 F.3d 1175, 1178 (9th Cir. 2007); *United States v. Baldrich*, 471 F.3d 1110, 1112 (9th Cir. 2006); *United States v. Herrera-Rojas*, 243 F.3d 1139, 1142 (9th Cir. 2001) (vacating sentence); *United States v. Standard*, 207 F.3d 1136, 1140 (9th Cir. 2000) (vacating sentence); *United States v. Havier*, 155 F.3d 1090, 1092

The court's decision whether to hold an evidentiary hearing on a Rule 32 motion is reviewed for an abuse of discretion. *See* *United States v. Pearson*, 274 F.3d 1225, 1234 (9th Cir. 2001).[196] If the defendant failed to request a Rule 32 evidentiary hearing in district court, this court reviews for plain error. *See* *United States v. Berry*, 258 F.3d 971, 976 (9th Cir. 2001).

19. Sentencing

a. Applicability of the Sentencing Guidelines and pre-Guidelines Standards of Review

The Sentencing Guidelines apply to defendants who committed offenses on or after November 1, 1987. Whether the Sentencing Guidelines apply to a given offense is a question of law reviewed de novo. *See* *United States v. Lynn*, 636 F.3d 1127, 1138 (9th Cir. 2011) (as amended); *United States v. Rising Sun*, 522 F.3d 989, 993 (9th Cir. 2008); *United States v. Alcarez-Camacho*, 340 F.3d 794, 796 (9th Cir. 2003); *United States v. Merino*, 44 F.3d 749, 753 (9th Cir. 1994).

Prior to the Guidelines, a district court had "virtually unfettered discretion in imposing sentence." *United States v. Baker*, 10 F.3d 1374, 1420 (9th Cir. 1993) (internal quotation omitted), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). The legality of a pre-Guidelines sentence is reviewed de novo. *See* *United States v. Pomazi*, 851 F.2d 244, 247 (9th Cir. 1988), *overruled on other grounds by Hughey v. United States*, 495 U.S. 411 (1990). Pre-Guidelines sentences that fall within statutory limits are left to the sound discretion of the district court and are reviewed only for abuse of discretion. *See* *Pomazi*, 851 F.2d at 247. If the sentence raises constitutional issues, however, review is more searching. *See* *id.*; *see also* *United States v. Tucker*, 404 U.S. 443, 447 (1972) (sentence within statutory limits generally not reviewable absent constitutional concerns). The district court's decision to impose pre-

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(9th Cir. 1998) (examining requirements of Rule 32.1 and vacating sentence); *United States v. Karterman*, 60 F.3d 576, 583 (9th Cir. 1995); *see also* *United States v. Ruiz*, 257 F.3d 1030, 1031 & 1033 (9th Cir. 2001) (en banc) (clarifying that "fair and just" standard applies to Rule 32(e) rather than "manifest injustice" test).

[196] *See also* *United States v. Houston*, 217 F.3d 1204, 1206-07 (9th Cir. 2000); *United States v. Stein*, 127 F.3d 777, 780 (9th Cir. 1997).

Guidelines and Guidelines sentences consecutively is reviewed for an abuse of discretion. *See* *United States v. Scarano*, 76 F.3d 1471, 1474 (9th Cir. 1996).

b. Application of the Guidelines to Specific Facts

A district court's sentencing decisions are reviewed for abuse of discretion. *See* *Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See* *Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007); *Carty*, 520 F.3d at 993. Procedural error includes failing to calculate (or calculating incorrectly) the proper Guidelines range, treating the Guidelines as mandatory, failing to consider the factors from 18 U.S.C. § 3553(a), choosing a sentence based on clearly erroneous facts, or failing to explain a selected sentence, including any deviation from the Guidelines range. *See* *Carty*, 520 F.3d at 993. In considering the substantive reasonableness of a sentence, the totality of the circumstances is considered. *See* *id.* A court of appeals may not presume a non-Guidelines sentence unreasonable. *See* *id.* Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *See* *id.* at 992.

Prior to *Carty*, in the Ninth Circuit there was conflicting case law regarding the proper standard of reviewing the application of the Guidelines. *See* *United States v. Staten*, 466 F.3d 708, 713 n.3 (2006) (noting split in authority). *Carty* conducts a review of the district court's application of the Guidelines under the appellate rubric set forth in the opinion, and overruled any prior case to the extent inconsistent with *Rita* or *Gall*. *See* *Carty*, 520 F.3d at 991 n.5, and 991-96; *but see* *United States v. Yip*, 592 F.3d 1035, 1038 (9th Cir. 2010) (noting a split in authority but declining to resolve it); *United States v. Rivera*, 527 F.3d 891, 908 (9th Cir. 2008) (same).

c. Constitutionality

The constitutionality of the Sentencing Guidelines is a question of law reviewed de novo.[197] The constitutionality of a sentence imposed under the

[197] *See* *United States v. Ellsworth*, 456 F.3d 1146, 1149 (9th Cir. 2006); *United States v. Leasure*, 319 F.3d 1092, 1096 (9th Cir. 2003); *United States*

Guidelines is reviewed de novo.[198] A claim that a defendant's sentence violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is also reviewed de novo. *See United States v. Dare*, 425 F.3d 634, 638 (9th Cir. 2005); *United States v. Smith*, 282 F.3d 758, 771 (9th Cir. 2002); *but see United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002) (holding that "*Apprendi* does not apply retroactively to cases on initial collateral review"); *see also Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1245-46 (9th Cir. 2005) (concluding that *Sanchez-Cervantes* is still valid in light of subsequent Supreme Court precedent).

d. Continuances

A trial court's refusal to grant a continuance of a sentencing hearing is reviewed for an abuse of discretion. *See Williams v. Stewart*, 441 F.3d 1030, 1056 (9th Cir. 2006) (as amended); *United States v. Lopez-Patino*, 391 F.3d 1034, 1036 (9th Cir. 2004); *United States v. Lewis*, 991 F.2d 524, 528 (9th Cir. 1993); *United States v. Monaco*, 852 F.2d 1143, 1150 (9th Cir. 1988).

e. Correcting/Amending/Reducing Sentences and Rule 35

Rule 35(a) permits corrections of sentences which are clearly erroneous under the Guidelines. *See United States v. Aguirre*, 214 F.3d 1122, 1126 (9th Cir. 2000) (discussing former Rule 35(c), now located in Rule 35(a)). Issues of law raised in a Rule 35(a) motion are reviewed de novo. *See United States v. Zakhor*, 58 F.3d 464, 465 (9th Cir. 1995) (challenge to application and constitutionality of Sentencing Reform Act in former Rule 35(c) motion). Whether a court has jurisdiction under Rule

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v. Mezas de Jesus, 217 F.3d 638, 642 (9th Cir. 2000); *United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997); *see also United States v. Booker*, 543 U.S. 220 (2005) (holding portions of the Guidelines unconstitutional).

[198] *See United States v. Leon H.*, 365 F.3d 750, 752 (9th Cir. 2004); *United States v. Barajas-Avalos*, 377 F.3d 1040, 1060 (9th Cir. 2004); *United States v. Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000); *United States v. Estrada-Plata*, 57 F.3d 757, 762 (9th Cir. 1995).

35(a) to resentence presents a question of law reviewed de novo. *See* *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011).[199]

Note that Fed. R. Crim. P. 35 was modified to conform with the Sentencing Guidelines.[200] Review of a trial court's decision under the former rule may arise, however, if the criminal conduct occurred prior to November 1, 1987. The district court's assumption of jurisdiction to resentence or modify a defendant's sentence pursuant to former Rule 35 is reviewed de novo. *See* *United States v. Stump*, 914 F.2d 170, 172 (9th Cir. 1990). The district court's ruling on a Rule 35 motion is reviewed for "illegality or gross abuse of discretion." *See* *United States v. Hayes*, 231 F.3d 1132, 1135 (9th Cir. 2000) (addressing pre-November 1, 1987 conduct). The trial court's decision not to hold an evidentiary hearing on a Rule 35 motion is reviewed for an abuse of discretion. *See* *Hayes*, 231 F.3d at 1135; *United States v. Gonzales*, 765 F.2d 1393, 1396 (9th Cir. 1985).

A trial court's decision whether to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range) is reviewed for an abuse of discretion. *See* *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009); *United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998); *United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996). The court's denial of a motion to amend a Guideline sentence is also reviewed for an abuse of discretion. *See* *Chaney*, 581 F.3d at 1125; *United States v. Hurt*, 345 F.3d 1033, 1035 (9th Cir. 2003).

f. Departures

A district court's sentencing decisions are reviewed for abuse of discretion. *See* *Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007); *Carty*, 520 F.3d at 993. Procedural error includes failing to calculate (or calculating incorrectly) the

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[199] *See* *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003); *United States v. Aguirre*, 214 F.3d 1122, 1124 (9th Cir. 2000); *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999).

[200] *See* *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999).

proper Guidelines range, treating the Guidelines as mandatory, failing to consider the factors from 18 U.S.C. § 3553(a), choosing a sentence based on clearly erroneous facts, or failing to explain a selected sentence, including any deviation from the Guidelines range. *See Carty*, 520 F.3d at 993. In considering the substantive reasonableness of a sentence, the totality of the circumstances is considered. *See id.* A court of appeals may not presume a non-Guidelines sentence unreasonable. *See id.* Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *See id.* at 992.

If a district court finds a non-Guidelines sentence appropriate, it must consider the extent of the deviation "and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* at 991 (quoting *Gall*, 552 U.S. at 50). The degree of variance is just one consideration. Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *Id.* at 992. For any departure from the Guidelines, due deference is given "to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 993 (quoting *Gall*, 552 U.S. at 51); s*ee also United States v. Shi*, 525 F.3d 709, 732-33 (9th Cir. 2008).

Prior to *United States v. Booker*, 543 U.S. 220 (2005), district court decisions to depart from the Guidelines were reviewed de novo in accordance with 18 U.S.C. § 3742(e).[201] *Booker* excised this and other

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[201] The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT) (April 30, 2003) amended 18 U.S.C. § 3742(e) and provided for de novo review of the district court's decision to depart from the applicable sentencing guideline. *See United States v. Barragan-Espinoza*, 350 F.3d 978, 981 (9th Cir. 2003). PROTECT thus overruled in part the holding of *Koon v. United States*, 518 U.S. 81, 99 (1996) (holding district court's decision to depart is reviewed for an abuse of discretion), and applied to all pending cases. *See United States v. Philips*, 367 F.3d 846, 860 (9th Cir. 2004) (holding PROTECT "applies to cases pending on appeal at the time of its enactment"); *United States v. Daychild*, 357 F.3d 1082, 1105-06 (9th Cir. 2004); *see also United States v. Leon*, 341 F.3d 928, 931 (9th Cir. 2003) (noting change in standard of review but declining to decide whether PROTECT applied to cases pending on appeal). Prior to PROTECT, a district court's decision to depart was reviewed under an abuse of discretion standard. *See, e.g., Barragan-Espinoza*, 350 F.3d at

provisions as unconstitutional and stated that the modified statute sets forth an implicit reasonableness standard for appellate review. *Booker*, 543 U.S. at 260-65. *Booker* applies to all cases pending on direct review at the time it was decided. *Id.* at 268. Also, prior to *Booker*, the extent of a district court's downward departure was reviewed for abuse of discretion.[202]

Booker requires the review of a sentence for reasonableness pursuant to the factors in 18 U.S.C. § 3553(a), and this includes the review of a denied downward departure. *See United States v. Dallman*, 533 F.3d 755, 760 (9th Cir. 2008).

Pre-*Booker*, the adequacy of the district court's notice to defendant of its intent to depart upward pursuant Fed. R. Crim. P. 32(h) was reviewed de novo. *United States v. Evans-Martinez*, 530 F.3d 1164, 1167 (9th Cir. 2008); *United States v. Garcia*, 323 F.3d 1161, 1165 (9th Cir. 2003) (articulating pre-Booker standard). Where the defendant fails to object to lack of notice, however, review for plain error applies, both pre- and post-*Booker*. *See Evans-Martinez*, 530 F.3d at 1167. The requirement, imposed by Rule 32(h), that a district court provide notice of its intent to depart from the Guidelines, survives *Booker*. *See id.* at 1168. However, the Supreme Court has clarified that Rule 32(h) no longer applies to a variance – as opposed to a departure – from a recommended Guidelines range. *See Irizarry v. United States*, 553 U.S. 708, 715 (2008). Pre-*Booker*, the district court's consideration of Chapter 7's non-binding policy statements was reviewed for an abuse of discretion. *See Garcia*, 323 F.3d at 1164.

981; *Leon*, 341 F.3d at 931; *United States v. Thompson*, 315 F.3d 1071, 1074 (9th Cir. 2002). PROTECT applied only to review of departures and not to a district court's refusal to depart downward. *See United States v. Linn*, 362 F.3d 1261, 1262 (9th Cir. 2004) (per curiam) (holding appellate court lacks jurisdiction to review district court's discretionary refusal to depart downward).

[202] *See Barragan-Espinoza*, 350 F.3d at 981 (explaining that PROTECT did not alter this standard of review); *United States v. Working*, 287 F.3d 801, 806 (9th Cir. 2002) (noting extent of departure must be "reasonable"); *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1060 (9th Cir. 2001) (noting extent of departure cannot be "grossly disproportionate to objective criteria").

g. Disparate Sentences

Before *United States v. Booker*, 543 U.S. 220 (2005), a claim of disparate sentencing was reviewed under the abuse of discretion standard. *See United States v. Bischel*, 61 F.3d 1429, 1437 (9th Cir. 1996) ("Generally, the imposition of disparate sentences alone is not an abuse of discretion, and a judge isn't required to give reasons for a disparate sentence in the absence of any evidence that a defendant is being punished for exercising his right to stand trial."). This standard has not been rearticulated since *Booker*.

Both before and after *Booker*, the Ninth Circuit "has applied the rational basis standard of review to equal protection challenges to the Sentencing Guidelines based on a comparison of allegedly disparate sentences." *United States v. Ellsworth*, 456 F.3d 1146, 1149 (9th Cir. 2006); *see also United States v. Johnson*, 626 F.3d 1085, 1088 (9th Cir. 2010).

h. Factual Findings

Before *United States v. Booker*, 543 U.S. 220 (2005), the district court's factual findings in the sentencing phase were reviewed for clear error.[203] Post-*Booker* a district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007); *Carty*, 520 F.3d at 993. Procedural error includes, among other things, choosing a sentence based on clearly erroneous facts. *See Carty*, 520 F.3d at 993; *see also United States v. Stoterau*, 524 F.3d 988, 997 (9th Cir. 2008) (reviewing factual findings for clear error).

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[203] *See United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004) (acceptance of responsibility); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088-89 (9th Cir. 2004) (acceptance of responsibility); *United States v. Cordova Barajas*, 360 F.3d 1037, 1042 (9th Cir. 2004) (minor participant); *United States v. Smith*, 282 F.3d 758, 772 (9th Cir. 2002) (minor or minimal role).

The Ninth Circuit has clarified the plain error standard to be applied when a *Booker* Sixth Amendment sentencing claim was not raised in pre-*Booker* proceedings at the district court. *See* *United States v. Ross*, 511 F.3d 1233, 1235 (9th Cir. 2008); *United States v. Ameline*, 409 F.3d 1073, 1078-85 (9th Cir. 2005) (en banc). When faced with an unpreserved *Booker* error, the court applies the "limited remand" procedure described in *Ameline*. *See* *Ameline*, 409 F.3d at 1078-85.

i. Fines

The legality of a fine imposed is a question of law reviewed de novo. *See* *United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Portin*, 20 F.3d 1028, 1029-30 (9th Cir. 1994). Whether a fine is constitutionally excessive is reviewed de novo. *See* *United States v. Bajakajian*, 524 U.S. 321, 336 & n.10 (1998). Whether a district court has the authority to modify a fine is a question of law reviewed de novo. *See* *United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000). The district court's determination that a defendant has the ability to pay a fine is a finding of fact reviewed for clear error. *See* *United States v. Rearden*, 349 F.3d 608, 617 (9th Cir. 2003).[204]

j. Interpretation and Application of Sentencing Guidelines

Before *United States v. Booker*, 543 U.S. 220 (2005), the district court's interpretation of the Sentencing Guidelines was reviewed de novo. *See* *United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004) ("interpretation" reviewed de novo); *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004) ("interpretation" reviewed de novo); *United States v. Mitchell*, 354 F.3d 1013, 1014 (9th Cir. 2004) ("application" reviewed de novo); *United States v. Garcia*, 323 F.3d 1161, 1164 (9th Cir. 2003) ("application" reviewed de novo); *United States v. Lopez-Garcia*, 316 F.3d 967, 970 (9th Cir. 2003) ("interpretation and application" reviewed de novo).

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[204] *See* *United States v. Sager*, 227 F.3d 1138, 1147 (9th Cir. 2000); *United States v. Scrivener*, 189 F.3d 944, 953 (9th Cir. 1999); *United States v. Ladum*, 141 F.3d 1328, 1344 (9th Cir. 1998).

Opinions since *Booker* have continued to apply this standard. See *United States v. Rivera*, 527 F.3d 891, 908 (9th Cir. 2008).

United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008) established the overarching standards for reviewing sentencing, but does not specifically address the standard for reviewing a district court's interpretation of the Guidelines.

The following subsections address specific issues related to interpretation and application of the guidelines.

i. Abuse of Trust Enhancement

The district court's application of the abuse of trust enhancement is a mixed question of law and fact reviewed de novo. *See United States v. Hoskins*, 282 F.3d 772, 776 (9th Cir. 2002), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (en banc) (per curiam); *but see United States v. Thornton*, 511 F.3d 1221, 1227 (9th Cir. 2008) (questioning whether de novo review still applies post-*Booker*, but declining to decide).

ii. Prior Conviction

The court's conclusion that a prior conviction may be used for purposes of sentencing enhancement is also reviewed de novo. *See United States v. Aguila-Montes de Oca*, 655 F.3d 915, 919 (9th Cir. 2011) (per curiam) (§ 2L1.2).[205] Whether a district court's determination that a prior conviction qualifies as a crime of violence is reviewed de novo. *See Aguila-Montes de Oca*, 655 F.3d at 919; *United States v. Rodriguez-Guzman*, 506 F.3d 738, 740-41 (9th Cir. 2007). Whether a defendant is a career offender is reviewed de novo. *See United States v. Mitchell*, 624 F.3d 1023, 1025 (9th Cir. 2010); *United States v. Crawford*, 520 F.3d 1072, 1077 (9th Cir. 2008); *United States v. Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006).

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[205] *See also United States v. Hernandez-Valdovinos*, 352 F.3d 1243, 1246 (9th Cir. 2003) (§ 2L1.2); *United States v. Ramirez*, 347 F.3d 792, 797 (9th Cir. 2003) (§ 4A1.1(c)); *United States v. Gallaher*, 275 F.3d 784, 790 (9th Cir. 2001) (Armed Career Criminal Act).

iii. Prison Credit Time

Whether the district court can grant prison credit time is a question of law reviewed de novo. *See* *United States v. Peters*, 470 F.3d 907, 908-09 (9th Cir. 2006) (per curiam); *United States v. Lualemaga*, 280 F.3d 1260, 1265 (9th Cir. 2002); *United States v. Checchini*, 967 F.2d 348, 349 (9th Cir. 1992).

iv. Aggravated Felonies

Whether the aggravated felony provisions of the guidelines apply to a conviction is reviewed de novo. *See* *United States v. Vidal*, 504 F.3d 1072, 1076 (9th Cir. 2007) (en banc).[206]

v. Approximation of Drug Quantities

Whether a district court's method of approximating the relevant drug quantity conforms to the guidelines is reviewed de novo. *See* *United States v. Chase*, 499 F.3d 1061, 1068 (9th Cir. 2007); *United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States v. Rosacker*, 314 F.3d 422, 425 (9th Cir. 2002).

vi. Grouping of Offenses

The trial court's "grouping of offenses" for purposes of applying the Sentencing Guidelines is also reviewed de novo. *See* *United States v. Melchor-Zaragoza*, 351 F.3d 925, 927 (9th Cir. 2003).[207] Note, however, that whether prior convictions are "related" for purposes of sentencing enhancement is a factual inquiry reviewed for clear error. *See* *United States v. Woodard*, 172 F.3d 717, 719 (9th Cir. 1999); *see also* *Buford v. United*

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[206] *See* *United States v. Figueroa-Ocampo*, 494 F.3d 1211, 1213 (9th Cir. 2007); *United States v. Espinoza-Cano*, 456 F.3d 1126, 1130 (9th Cir. 2006); *United States v. Sanchez-Sanchez*, 333 F.3d 1065, 1067 (9th Cir. 2003); *United States v. Hernandez-Castellanos*, 287 F.3d 876, 878 (9th Cir. 2002).

[207] *See* *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002); *United States v. Seesing*, 234 F.3d 456, 458 (9th Cir. 2001); *United States v. Boos*, 127 F.3d 1207, 1209 (9th Cir. 1997).

States, 532 U.S. 59, 60 (2001) (clarifying that standard is a deferential search for clear error).

vii. Reductions for Change in Guideline Range (§ 3582(c)(2))

A trial court's denial of a motion to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range) is reviewed for an abuse of discretion. *See United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009); *United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998); *United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996).

k. Legality

The legality of a Guidelines sentence is reviewed de novo. *See United States v. Garcia-Guerrero*, 635 F.3d 435, 438 (9th Cir. 2011); *United States v. Napier*, 463 F.3d 1040, 1042 (9th Cir. 2006).[208]

l. Restitution

A restitution order is reviewed for an abuse of discretion, provided that it is within the bounds of the statutory framework. *See United States v. Brock-Davis*, 504 F.3d 991, 996 (9th Cir. 2007).[209] When the restitution order is not challenged before the district court, review is limited to plain error. *See United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004); *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003).

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[208] *See United States v. Smith*, 330 F.3d 1209, 1212 (9th Cir. 2003); *United States v. Tighe*, 266 F.3d 1187, 1190 (9th Cir. 2001); *United States v. Reyes-Pacheco*, 248 F.3d 942, 945 (9th Cir. 2001); *United States v. Tam*, 240 F.3d 797, 803 (9th Cir. 2001); *United States v. Carter*, 219 F.3d 863, 866 (9th Cir. 2000); *United States v. Hankey*, 203 F.3d 1160, 1166 (9th Cir. 2000).

[209] *See United States v. Berger*, 473 F.3d 1080, 1104 (9th Cir. 2007); *United States v. Gordon*, 393 F.3d 1044, 1051 (9th Cir. 2004); *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. De La Fuente*, 353 F.3d 766, 772 (9th Cir. 2003); *United States v. Riley*, 335 F.3d 919, 931 (9th Cir. 2003); *United States v. Grice*, 319 F.3d 1174, 1176 (9th Cir. 2003) (per curiam); *United States v. Pizzichiello*, 272 F.3d 1232, 1240 (9th Cir. 2001).

Factual findings supporting a restitution order are reviewed for clear error. *See* *United States v. Brock-Davis*, 504 F.3d 991, 996 (9th Cir. 2007).[210]

The legality of a restitution order, however, is reviewed de novo. *See* *Brock-Davis*, 504 F.3d at 996; *United States v. Bussell*, 414 F.3d 1048, 1060-61 (9th Cir. 2005) ("In contrast to its application of the Sentencing Guidelines, the district court's orders of restitution and costs are unaffected by the changes worked by *Booker*. . . . We review the legality of the orders de novo.").[211]

A court has broad discretion in ordering restitution. *See* *United States v. Berger*, 473 F.3d 1080, 1104 (9th Cir. 2007); *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999); *United States v. Miguel*, 49 F.3d 505, 511 (9th Cir. 1995). The amount of restitution ordered is reviewed for an abuse of discretion. *See* *United States v. Bussell*, 504 F.3d 956, 964 n.9 (9th Cir. 2007).[212] The court's "valuation methodology" is reviewed, however, de novo. *See* *Bussell*, 504 F.3d at 964 n.9; *Berger*, 473 F.3d at 1104; *see also* *United States v. Fu Sheng Ko*, 620 F.3d 1158, 1162 (9th Cir. 2010).

m. Rule 32

The sentencing court's compliance with Fed. R. Crim. P. 32 is reviewed de novo. *See* *United States v. Burkholder*, 590 F.3d 1071, 1076 (9th Cir. 2010); *United States v. Stoterau*, 524 F.3d 988, 1011 (9th Cir.

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[210] *See also* *Berger*, 473 F.3d at 1104; *Gordon*, 393 F.3d at 1051; *De La Fuente*, 353 F.3d at 772; *Pizzichiello*, 272 F.3d at 1240; *United States v. Allen*, 153 F.3d 1037, 1044-45 (9th Cir. 1998).

[211] *See also* *Berger*, 473 F.3d at 1104; *Gordon*, 393 F.3d at 1051; *Phillips*, 367 F.3d at 854; *United States v. Cliatt*, 338 F.3d 1089, 1090 (9th Cir. 2003); *Grice*, 319 F.3d at 1176; *Pizzichiello*, 272 F.3d at 1240; *United States v. Follet*, 269 F.3d 996, 999 (9th Cir. 2001); *United States v. Laney*, 189 F.3d 954, 964-65 (9th Cir. 1999).

[212] *See also* *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *Laney*, 189 F.3d at 966; *United States v. Johnson*, 132 F.3d 1279, 1286 (9th Cir. 1997); *United States v. Zink*, 107 F.3d 716, 718 (9th Cir. 1997); *United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996).

2008).[213] The court's decision whether to hold an evidentiary hearing on a Rule 32 motion is reviewed for an abuse of discretion. *See United States v. Pearson*, 274 F.3d 1225, 1234 (9th Cir. 2001).[214] If the defendant failed to request a Rule 32 evidentiary hearing in district court, this court reviews for plain error. *See United States v. Berry*, 258 F.3d 971, 976 (9th Cir. 2001).

20. Sufficiency of the Evidence

Claims of insufficient evidence are reviewed de novo. *See United States v. Bennett*, 621 F.3d 1131, 1135 (9th Cir. 2010); *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008).[215]

There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).[216] In habeas review, the state court's application of *Jackson v. Virginia*, 443 U.S. 307 (1979) must be "objectively unreasonable," the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") notwithstanding. *See Juan H. v. Allen*, 408 F.3d 1262, 1275 n.13 (9th Cir. 2005) (as amended) ("We note that this Circuit has not yet decided what standard applies to sufficiency of the evidence challenges under AEDPA. We conclude that the Supreme Court's analysis of AEDPA in *Williams* compels the conclusion that the state court's application of the *Jackson* standard must be 'objectively unreasonable.'") (citations omitted). The same test applies to both jury and

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[213] *See also United States v. Saeteurn*, 504 F.3d 1175, 1178 (9th Cir. 2007); *United States v. Baldrich*, 471 F.3d 1110, 1112 (9th Cir. 2006); *United States v. Herrera-Rojas*, 243 F.3d 1139, 1142 (9th Cir. 2001); *United States v. Standard*, 207 F.3d 1136, 1140 (9th Cir. 2000); *United States v. Havier*, 155 F.3d 1090, 1092 (9th Cir. 1998); *see also United States v. Ruiz*, 257 F.3d 1030, 1031 (9th Cir. 2001) (en banc) (clarifying that "fair and just" standard applies to Rule 32(e) rather than "manifest injustice" test).

[214] *See also United States v. Houston*, 217 F.3d 1204, 1206-07 (9th Cir. 2000); *United States v. Stein*, 127 F.3d 777, 780 (9th Cir. 1997).

[215] *See also United States v. Stanton*, 501 F.3d 1093, 1100 (9th Cir. 2007); *United States v. Lopez*, 477 F.3d 1110, 1113 (9th Cir. 2007); *United States v. Shipsey*, 363 F.3d 962, 971 n.8 (9th Cir. 2004); *see also Chein v. Shumsky*, 373 F.3d 978, 982 (9th Cir. 2004) (en banc) (habeas).

[216] *See Stanton*, 501 F.3d at 1100; *Lopez*, 477 F.3d at 1113.

bench trials. *See* *United States v. Magallon-Jimenez*, 219 F.3d 1109, 1112 (9th Cir. 2000).[217]

When a claim of sufficiency of the evidence is preserved by making a motion for acquittal at the close of the evidence, this court reviews the district court's denial of the motion de novo. *See* *United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010); *United States v. Stewart*, 420 F.3d 1007, 1014 (2005); *see also* *United States v. Sandoval-Gonazlez*, 642 F.3d 717, 727 (9th Cir. 2011).[218]

The defendant's failure to move for acquittal at the close of all the evidence limits appellate review to plain error or manifest injustice. *See* *United States v. Pelisamen*, 641 F.3d 399, 408-09 & n.6 (9th Cir. 2011).[219]

21. Supervised Release

District courts have wide discretion in fashioning a defendant's obligations during terms of supervised release. *See* *United States v. Napulou*, 593 F.3d 1041 (9th Cir. 2010). [220] A district court's decision to

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[217] *See* *United States v. Doe*, 136 F.3d 631, 636 (9th Cir. 1998); *United States v. Mayberry*, 913 F.2d 719, 721 (9th Cir. 1990).

[218] *See* *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002); *United States v. Tucker*, 133 F.3d 1208, 1214 (9th Cir. 1998); *United States v. Hernandez*, 105 F.3d 1330, 1332 (9th Cir. 1997); *United States v. Bahena-Cardenas*, 70 F.3d 1071, 1072 (9th Cir. 1995).

[219] *United States v. Lowry*, 512 F.3d 1194, 1198 n.3 (9th Cir. 2008); *United States v. Gonzales*, 528 F.3d 1207, 1210 (9th Cir. 2008); *United States v. Delgado*, 357 F.3d 1061, 1068 (9th Cir. 2004); *United States v. Ross*, 338 F.3d 1054, 1057 (9th Cir. 2003); *United States v. Franklin*, 321 F.3d 1231, 1239 (9th Cir. 2003); *United States v. Weber*, 320 F.3d 1047, 1050-51 (9th Cir. 2003); *United States v. Alarcon-Simi*, 300 F.3d 1172, 1176 (9th Cir. 2002); *see also* *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1010 (9th Cir. 1995) (noting reluctance to affirm conviction when there is insufficient evidence to sustain the conviction regardless of standard of review to be applied).

[220] *See* *United States v. Weber*, 451 F.3d 552, 557 (9th Cir. 2006); *United States v. Williams*, 356 F.3d 1045, 1052 (9th Cir. 2004) ("wide latitude"); *United States v. Rearden*, 349 F.3d 608, 618 (9th Cir. 2003);

impose a condition of supervised release is typically reviewed for an abuse of discretion. *See* *United States v. Rudd*, 662 F.3d 1257, 1260 (9th Cir. 2011); *United States v. Apodaca*, 641 F.3d 1077, 1079 (9th Cir. 2011).[221] Review is de novo, however, when this court reviews the district court's application of the supervised release statute.[222] Jurisdictional issues are also reviewed de novo. *See* *United States v. Ignacio Juarez*, 601 F.3d 885, 888 (9th Cir. 2010) (per curiam).[223] Similarly, whether a district court has the authority to reinstate an original term of supervised release is a question of law reviewed de novo. *See* *United States v. Trenter*, 201 F.3d 1262, 1263 (9th Cir. 2000). Whether a district court has the authority to modify a fine when it is an express condition of supervised release is also a question of law reviewed de novo. *See* *United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000).

It is plain error to sentence a defendant to a term of supervised release that exceeds the statutory maximum. *See* *United States v. Guzman-Bruno*, 27 F.3d 420, 423 (9th Cir. 1994).

A district court's decision to revoke a term of supervised release is reviewed for an abuse of discretion. *See* *United States v. Harvey*, 659 F.3d

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United States v. Lopez, 258 F.3d 1053, 1056 (9th Cir. 2001); *United States v. Bee*, 162 F.3d 1232, 1234 (9th Cir. 1998).

[221] *See* *United States v. Stoterau*, 524 F.3d 988, 1002 (9th Cir. 2008); *United States v. Cope*, 527 F.3d 944, 949 (9th Cir. 2008); *United States v. Betts*, 511 F.3d 872, 874 (9th Cir. 2007); *United States v. Jeremiah*, 493 F.3d 1042, 1046 (9th Cir. 2007); *Weber*, 451 F.3d at 557 (9th Cir. 2006); *Williams*, 356 F.3d at 1052; *United States v. Britt*, 332 F.3d 1229, 1231 (9th Cir. 2003); *United States v. T.M.*, 330 F.3d 1235, 1239-40 (9th Cir. 2003) (noting discretion is not unfettered); *United States v. Gallaher*, 275 F.3d 784, 793 (9th Cir. 2001).

[222] *See* *United States v. Anderson*, 519 F.3d 1021, 1022 (9th Cir. 2008); *United States v. Tinoso*, 327 F.3d 864, 865 (9th Cir. 2003); *United States v. Cade*, 236 F.3d 463, 465 (9th Cir. 2000); *United States v. Lomayoama*, 86 F.3d 142, 146 (9th Cir. 1996).

[223] *See* *United States v. Sullivan*, 504 F.3d 969, 971 (9th Cir. 2007); *United States v. Vargas-Amaya*, 389 F.3d 901, 903 (9th Cir. 2004) (reviewing de novo jurisdiction to revoke supervised release under 18 U.S.C. § 3583(i)); *United States v. Morales-Alejo*, 193 F.3d 1102, 1104 (9th Cir. 1999); *United States v. Malandrini*, 177 F.3d 771, 772 (9th Cir. 1999).

1272, 1274 (9th Cir. 2011).[224] Whether a defendant has received sufficient due process at a revocation proceeding is a mixed question of law and fact that is reviewed de novo. *See United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Havier*, 155 F.3d 1090, 1092 (9th Cir. 1998). Any such due process violation is subject to harmless error analysis. *See Perez*, 526 F.3d at 547; *United States v. Verduzco*, 330 F.3d 1182, 1184 (9th Cir. 2003); *United States v. Daniel*, 209 F.3d 1091, 1094 (9th Cir.), *amended by* 216 F.3d 1201 (9th Cir. 2000); *Havier*, 155 F.3d at 1090. A court's decision at a revocation hearing to deny defendant's request for substitute counsel is reviewed for an abuse of discretion. *See United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000). The district court's refusal to grant vacatur of a revocation judgment is reviewed for an abuse of discretion. *See United States v. Tapia-Marquez*, 361 F.3d 535, 537 (9th Cir. 2004).

22. Transcripts

A criminal defendant has a right to a record on appeal that includes a complete transcript of the proceedings at trial. *See United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994); *United States v. Carrillo*, 902 F.2d 1405, 1409 (9th Cir. 1990). A trial court's finding that transcripts are accurate and complete cannot be disturbed unless clearly erroneous. *See Carrillo*, 902 F.2d at 1410. A court's decision to allow a jury to have English translations of Spanish wiretap tape recordings is reviewed for an abuse of discretion. *See United States v. Fuentes-Montijo*, 68 F.3d 352, 353 (9th Cir. 1995).[225]

A claim that the district court violated a defendant's constitutional right to prepare an adequate defense by refusing to provide free transcripts of a prior proceeding is reviewed de novo. *See United States v. Devlin*, 13 F.3d 1361, 1363 (9th Cir. 1994).

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[224] *See United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Verduzco*, 330 F.3d 1182, 1184 (9th Cir. 2003); *United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Musa*, 220 F.3d 1096, 1100 (9th Cir. 2000); *United States v. Daniel*, 209 F.3d 1091, 1094 (9th Cir.), *amended by* 216 F.3d 1201 (9th Cir. 2000).

[225] *See also United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999) (English translation of Albanian wiretap tape recordings).

The district court's decision to use transcripts as an aid in listening to tape recordings is reviewed for an abuse of discretion. *See* *United States v. Delgado*, 357 F.3d 1061, 1068 (9th Cir. 2004).[226] Where there is no dispute as to accuracy, this court reviews for an abuse of discretion the trial court's decision to allow the use of transcripts during trial and to allow them into the jury room. *See* *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999).[227] A district court is not, however, required as a matter of law to determine whether a transcript is accurate before permitting a jury to look at it. *See* *United States v. Tisor*, 96 F.3d 370, 377 (9th Cir. 1996).

The erroneous inclusion of audio tapes allowed in the jury room that were not admitted into evidence is constitutional error subject to the harmless error standard. *See* *Eslaminia v. White*, 136 F.3d 1234, 1237 & n.1 (9th Cir. 1998) (habeas); *but see* *United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996), *amended by* 140 F.3d 1244 (9th Cir. 1998) (allowing unplayed audio tapes into the jury room is structural error).

The trial court's decision whether to release grand jury transcripts is reviewed for an abuse of discretion. *See* *United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997).

23. Writ Ad Testificandum

The trial court's refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify is reviewed for an abuse of discretion. *See* *United States v. Smith*, 924 F.2d 889, 896 (9th Cir. 1991). The court's allocation of costs under a writ of habeas corpus ad testificandum is also reviewed for an abuse of discretion. *See* *Wiggins v. County of Alameda*, 717 F.2d 466, 468 (9th Cir. 1983).

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[226] *See* *United States v. Abonce-Barrera*, 257 F.3d 959, 963 (9th Cir. 2001); *Rrapi*, 175 F.3d at 746; *United States v. Tisor*, 96 F.3d 370, 377 (9th Cir. 1996); *United States v. Armijo*, 5 F.3d 1229, 1234 (9th Cir. 1993).

[227] *See* *United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir. 1998); *Tisor*, 96 F.3d at 377; *United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir. 1995); *United States v. Pena-Espinoza*, 47 F.3d 356, 359 (9th Cir. 1995); *United States v. Hernandez*, 27 F.3d 1403, 1408 (9th Cir. 1994) ("We review a decision to allow the jury to reread transcripts in the jury room for an abuse of discretion.").

24. Writ of Audita Querela

This court reviews de novo the question whether a federal prisoner challenging a conviction and sentence may properly file a petition for a writ of audita querela. *See* *United States v. Valdez-Pacheco*, 237 F.3d 1077, 1079 (9th Cir. 2000); *United States v. Fonseca-Martinez*, 36 F.3d 62, 63 (9th Cir. 1994) (per curiam). The effectiveness of such a writ for purposes of immigration is also a pure legal issue reviewed de novo. *See* *Beltran-Leon v. INS*, 134 F.3d 1379, 1380 (9th Cir. 1998). The district court's decision to grant a writ of audita querela is reviewed de novo. *See* *United States v. Gamboa*, 608 F.3d 492, 494 (9th Cir. 2010); *United States v. Hovsepian*, 359 F.3d 1144, 1153 (9th Cir. 2004) (en banc).

25. Writ of Coram Nobis

The denial of a writ of error coram nobis is reviewed de novo. *See* *United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007); *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002); *United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989).

E. Habeas Corpus Petitions

1. 28 U.S.C. § § 2241

The district court's decision to grant or deny a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 is reviewed de novo. *See* *Farmer v. McDaniel*, 666 F.3d 1228, 1232 (9th Cir. 2012); *see also* *Harrison v. Gillespie*, 640 F.3d 888, 896-97 (9th Cir. 2011) (en banc) (adopting original panel's majority discussion of standard of review).[228] The court's dismissal of a § 2241 petition is also reviewed de novo. *See* *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011) (as amended); *Zegarra-Gomez v. INS*, 314 F.3d 1124, 1126 (9th Cir. 2003).[229] Whether a district court has jurisdiction over a § 2241 petition is reviewed

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[228] *See also* *Parle v. Runnels*, 505 F.3d 922, 926 (9th Cir. 2007); *Hunter v. Ayers*, 336 F.3d 1007, 1011 (9th Cir. 2003); *Benny v. United States Parole Comm.*, 295 F.3d 977, 981 (9th Cir. 2002); *Taylor v. Sawyer*, 284 F.3d 1143, 1147 (9th Cir. 2002).

[229] *See also* *Miranda v. Reno*, 238 F.3d 1156, 1158 (9th Cir. 2001); *Nakaranurack v. United States*, 231 F.3d 568, 570 (9th Cir. 2000).

de novo. *See* *Iasu v. Smith*, 511 F.3d 881, 884 (9th Cir. 2008).[230] A district court's decision whether to stay habeas proceedings is reviewed for an abuse of discretion. *See* *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003) (noting discretion "must be exercised within constitutional and statutory limits").[231]

For information regarding how the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") Pub. L. No. 104-208, 110 Stat. 3009, and the subsequent passage of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), affected habeas review of final orders of exclusion, removal, or deportation *see* III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, v. Immigration.

2. 28 U.S.C. § § 2255

The district court's decision to grant or deny a federal prisoner's 28 U.S.C. § 2255 motion is reviewed de novo. *See* *United States v. Aguirre-Ganceda*, 592 F.3d 1043,1045 (9th Cir. 2010) (denial); *Mendoza v. Carey*, 449 F.3d 1065, 1068 (9th Cir. 2006) (denial).[232] Whether a district court has jurisdiction over a § 2255 motion is reviewed de novo. *See* *United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002) (construing action as a § 2255 motion).[233] The dismissal of a § 2255 motion based on statute of limitations

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[230] *See also* *Puri v. Gonzales*, 464 F.3d 1038, 1040 (9th Cir. 2006); *Johnson v. Reilly*, 349 F.3d 1149, 1153 (9th Cir. 2003); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044 (9th Cir. 2000); *Barapind v. Reno*, 225 F.3d 1100, 1109-10 (9th Cir. 2000).

[231] *See also* *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000) (noting review is "somewhat less deferential" than usual abuse of discretion).

[232] *See, e.g.*, *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1195 & n.4 (9th Cir. 2005) (denial); *United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003) (denial); *United States v. Skurdal*, 341 F.3d 921, 925 (9th Cir. 2003) (denial); *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003) (denial); *United States v. Day*, 285 F.3d 1167, 1169 (9th Cir. 2002) (denial).

[233] *See* *United States v. Martin*, 226 F.3d 1042, 1045 (9th Cir. 2000) (reconsideration); *see also* *United States v. Thiele*, 314 F.3d 399, 401-02 (9th Cir. 2002) (noting limitations of § 2255).

is reviewed de novo. *See* *United States v. Battles*, 362 F.3d 1195, 1196 (9th Cir. 2004).

Findings underlying the court's decision on a § 2255 motion are reviewed for clear error. *See* *Aguirre-Ganceda*, 592 F.3d at 1045.[234] The district court's decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. *See* *Mendoza*, 449 F.3d at 1068.[235]

Note that for purposes of § 2255, constitutional errors may be deemed harmless unless petitioner demonstrates that the error had a "substantial and injurious effect or influence" on the jury's verdict. *See* *United States v. Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (applying *Brecht* standard).

3. 28 U.S.C. § 2254

The district court's decision to grant or deny a 28 U.S.C.§ 2254 habeas petition is reviewed de novo. *See* *Blair v. Martel*, 645 F.3d 1151, 1154 n.1 (9th Cir. 2011); *Leavitt v. Arave*, 646 F.3d 605, 608 (9th Cir. 2011) (granting); *Benitez v. Garcia*, 495 F.3d 640, 643 (9th Cir. 2007) (denying); *Arnold v. Runnels*, 421 F.3d 859, 862 (9th Cir. 2005) (denying); *Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004) (granting).[236] Note that this court may affirm on any ground supported by the record even if it differs from the rationale of the district court. *See* *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc); *Washington v. Lampert*, 422 F.3d 864, 869 (9th Cir. 2005); *Ramirez*, 365 F.3d at 762.

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[234] *See also* *United States v. Battles*, 362 F.3d 1195, 1196 (9th Cir. 2004); *United States v. Alaimalo*, 313 F.3d 1188, 1191 (9th Cir. 2002); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001); *United States v. Guess*, 203 F.3d 1143, 1145 (9th Cir. 2000); *Sanchez v. United States*, 50 F.3d 1448, 1452 (9th Cir. 1995).

[235] *See also* *Sandoval-Lopez*, 409 F.3d at 1195 & n.4; *Rodrigues*, 347 F.3d at 823; *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003); *Christakis*, 238 F.3d at 1168; *Chacon-Palomares*, 208 F.3d at 1158-59.

[236] *See e.g.*, *Beardslee v. Woodford*, 358 F.3d 560, 568 (9th Cir. 2004) (denying); *Nunes v. Mueller*, 350 F.3d 1045, 1051 (9th Cir. 2003) (granting); *Gill v. Ayers*, 342 F.3d 911, 917 (9th Cir. 2003) (denying); *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003) (granting).

A dismissal of a habeas petition for mootness is reviewed de novo. *See* *Abdala v. INS*, 488 F.3d 1061, 1063 n.1 (9th Cir. 2007); *Zegarra-Gomez v. INS*, 314 F.3d 1124, 1126 (9th Cir. 2003). Dismissals based on jurisdiction are also reviewed de novo. *See* *Lucky v. Calderon*, 86 F.3d 923, 925 (9th Cir. 1996); *Cook v. Maleng*, 847 F.2d 616, 617 (9th Cir. 1988) (per curiam). The rejection of a sufficiency of the evidence challenge in a habeas petition is also reviewed de novo. *See* *United States v. Wright*, 625 F.3d 583, 590 (9th Cir. 2010); *Chein v. Shumsky*, 373 F.3d 978, 982 (9th Cir. 2004) (en banc).

Dismissals based on state procedural default are reviewed de novo. *See* *Robinson v. Schriro*, 595 F.3d 1086, 1099 (9th Cir. 2010); *Griffin v. Johnson*, 350 F.3d 956, 960 (9th Cir. 2003); *Cockett v. Ray*, 333 F.3d 938, 941 (9th Cir. 2003).[237]

Dismissals based on a prisoner's failure to exhaust remedies are reviewed de novo. *See* *Fields v. Waddington*, 401 F.3d 1018, 1020 (9th Cir. 2005); *Peterson v. Lampert*, 319 F.3d 1153, 1155 (9th Cir. 2003) (en banc); *Greene v. Lambert*, 288 F.3d 1081, 1086 (9th Cir. 2002). Whether a state prisoner must exhaust state remedies before pursuing a federal constitutional claim is a question of law to be reviewed de novo. *See* *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997).

Dismissals of "mixed petitions" are reviewed de novo. *See* *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th Cir. 2008); *Robbins* v. *Carey*, 481 F.3d 1143, 1146 (9th Cir. 2007); *Cassett v. Stewart*, 406 F.3d 614, 620-21 (9th Cir. 2005); *Olvera v. Giurbino*, 371 F.3d 569, 572 (9th Cir. 2004) (noting district court's decision whether to grant petitioner's request for "withdrawal and abeyance" is reviewed for abuse of discretion).

A dismissal for failure to comply with an order requiring submission of pleadings within a designated time is reviewed for an abuse of discretion. *See* *Pagtalunan v. Galaza*, 291 F.3d 639, 640 (9th Cir. 2002).

Findings of fact made by the district court are reviewed for clear error. *See* *Leavitt v. Arave*, 646 F.3d 605, 608 (9th Cir. 2011); *Buckley v. Terhune*,

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[237] *See also* *Vang v. Nevada*, 329 F.3d 1069, 1072 (9th Cir. 2003); *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001); *Hoffman v. Arave*, 236 F.3d 523, 529 (9th Cir. 2001).

441 F.3d 688, 694 (9th Cir. 2006); *Washington v. Lampert*, 422 F.3d 864, 869 (9th Cir. 2005); *Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003);[238] *cf. Juan H. v. Allen*, 408 F.3d 1262, 1269 (9th Cir. 2005) ("Although we normally review for clear error any factual findings of the district court, . . . in this case the district court made no independent factual findings, and so we review the state court findings under the deferential standards of AEDPA . . . .").

Note that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") altered habeas review of state convictions brought under § 2254. *See Bell v. Cone*, 535 U.S. 685, 693 (2002); *Bartlett v. Alameida*, 366 F.3d 1020, 1023 (9th Cir. 2004) (noting AEDPA limits appellate review); *Riley*, 352 F.3d at 1317 (noting "constrained standards of review").

The AEDPA does not apply, however, to the merits of petitions filed before the effective date of the Act. *See, e.g., Brown v. Sanders*, 546 U.S. 212, 215 n.1 (2006) (citing *Lindh v. Murphy*, 521 U.S. 320, 327 (1997)); *Duncan v. Ornoski*, 528 F.3d 1222, 1232-33 (9th Cir. 2008); *Lambright v. Schriro*, 490 F.3d 1103, 1113-14 (9th Cir. 2007); *Raley v. Ylst*, 470 F.3d 792, 799 (9th Cir. 2006); *Caswell v. Calderon*, 363 F.3d 832, 836 n.3 (9th Cir. 2004).[239]

Although this court applies pre-AEDPA law to petitions filed before the Act's effective date, post-AEDPA law governs the right of the petitioner to appeal. *See Slack v. McDaniel*, 529 U.S. 473, 482 (2000) (holding that AEDPA's requirements regarding certificates of appealability apply to petition filed prior to effective date of act); *Smith v. Mahoney*, 611 F.3d 978, 993 (9th Cir. 2010) (amended); *Beardslee v. Woodford*, 358 F.3d 560, 568 (9th Cir. 2004) (applying *Slack*); *Nevius v. McDaniel*, 218 F.3d 940, 942 (9th Cir. 2000) (order) (noting § 2253(c) provides that petitioner cannot appeal unless a circuit justice or judge issues a certificate of appealability).

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[238] *See also Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003); *McClure v. Thompson*, 323 F.3d 1233, 1240 (9th Cir. 2003) (noting standard is "significantly deferential").

[239] *See also Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001) (en banc) (noting pre-AEDPA standards of review apply when petition was filed prior to effective date); *see also Smith v. Robbins*, 528 U.S. 259, 268 n.3 (2000) (noting AEDPA does not apply to petitions filed before the effective date of April 24, 1996).

Under the AEDPA, a petitioner must demonstrate that the state court's decision on the merits was contrary to, or involved an unreasonable application of, clearly established federal law under United States Supreme Court precedent, or that the decision was based on an unreasonable determination of the facts. *See* Lockyer v. Andrade, 538 U.S. 63, 70-73 (2003) (explaining standard).[240] "A state court decision is an unreasonable application of clearly established federal law if the state court identified the correct governing legal rule but unreasonably applied it to the facts at hand." *Christian v. Frank*, 595 F.3d 1076, 1081 (9th Cir. 2010) (internal quotation marks and citation omitted).

Under the AEDPA, state court findings of fact are to be presumed correct unless petitioner rebuts the presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Ybarra v. McDaniel*, 656 F.3d 984, 989 (9th Cir. 2011); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008).[241] This presumption applies even if the finding was made by a state court of appeals rather than by the state trial court. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.) *amended by* 253 F.3d 1150 (9th Cir. 2001). Where the state court fails to articulate its reasoning, however, the reviewing court grants less deference to the state court's decision. *See Brown v. Palmateer*, 379 F.3d 1089, 1092-93 (9th Cir. 2004) ("Because the [state] courts have provided no *ratio decidendi* to review, or to which we can give deference, we employ the 'objectively reasonable' test. In this situation, federal habeas courts accord the state court decisions less deference than in

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[240] *See also Doe v. Busby*, 661 F.3d 1001, 1010 (9th Cir. 2010); *Parle v. Runnels*, 505 F.3d 922, 926 (9th Cir. 2007); *Arnold v. Runnels*, 421 F.3d 859, 862 (9th Cir. 2005); *Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004) (reciting and applying standard); *Chia v. Cambra*, 360 F.3d 997, 1002 (9th Cir. 2004) (explaining "unreasonable application" prong); *Vlasak v. Superior Court*, 329 F.3d 683, 687 (9th Cir. 2003) (explaining "contrary to" prong); *Lewis v. Lewis*, 321 F.3d 824, 829 (9th Cir. 2003) (noting "highly deferential standard").

[241] *See also Plumlee v. Masto*, 512 F.3d 1204, 1209 (9th Cir. 2008); *Bockting v. Bayer*, 505 F.3d 973, 978 (9th Cir. 2007); *Stenson v. Lambert*, 504 F.3d 873, 881 (9th Cir. 2007).

standard habeas cases.") (citing *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000)).[242]

In § 2254 cases, an error may be harmless unless it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011).[243]

The AEDPA limits a district court's decision to conduct evidentiary hearings in § 2254 proceedings. *See* 28 U.S.C. § 2254(e)(2); *see also Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1171 n.4 (9th Cir. 2003) (reviewing limitations).[244] If the petitioner failed in state court to develop the factual basis for a claim, no hearing may be held unless the claim relies on (1) a new rule of constitutional law or facts previously undiscoverable and (2) it is

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[242] *See also Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999) (noting trial judge made no factual determinations entitled to deference under 28 U.S.C. § 2254(e)(1) and that other factual findings were reviewed for clear error).

[243] *See also Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (noting not all constitutional errors entitle petitioner to relief; rather the "court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict."); *California v. Roy*, 519 U.S. 2, 5-6 (1996) (per curiam) (rejecting Ninth Circuit's "modification" of the *Brecht* standard); *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005) (holding that the *Brecht* standard survived the AEDPA and *Mitchell v. Esparza*, 540 U.S. 12 (2003), despite contrary views in other circuits); *Kennedy v. Lockyer*, 379 F.3d 1041, 1053-54 (9th Cir. 2004) (noting that *Brecht* standard applies to both post-AEDPA and pre-AEDPA cases); *Gill v. Ayers*, 342 F.3d 911, 921 (9th Cir. 2003) (reciting and explaining *Brecht* standard); *Evanchyk v. Stewart*, 340 F.3d 933, 941 n. 3 (9th Cir. 2003) (noting circuit has "not used always used the same language in describing the harmless error standard in habeas cases").

[244] *Bragg v. Galaza*, 242 F.3d 1082, 1089-90 (9th Cir.) (noting AEDPA precludes remand for an evidentiary hearing), *amended by* 253 F.3d 1150 (9th Cir. 2001); *Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000) (noting AEDPA limits district court's discretion); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999) (noting AEDPA "substantially restricts the district court's discretion to grant an evidentiary hearing").

clear by "clear and convincing evidence" that but for the claimed error, "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). The district court's interpretation of these standards in determining whether to conduct an evidentiary hearing is reviewed de novo. *See Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). The court's decision to deny an evidentiary hearing based on these standards is reviewed for an abuse of discretion. *See Davis v. Woodford*, 333 F.3d 982, 991 (9th Cir. 2003), *amended by* 384 F.3d 628 (9th Cir. 2004).

In cases not under AEDPA, a state habeas petitioner is entitled to an evidentiary hearing if she alleged facts that, if proven, would entitle her to relief and she did not receive a full and fair evidentiary hearing in a state court. *See Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004); *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).[245] The court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. *See Stankewitz*, 365 F.3d at 714; *Beardslee v. Woodford*, 384 F.3d 560, 573 (9th Cir. 2004); *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003).

The decision to conduct an evidentiary hearing is also reviewed for an abuse of discretion. *See Lawson v. Borg*, 60 F.3d 608, 611 (9th Cir. 1995). The district court's decision to conduct an evidentiary hearing without petitioner's presence is reviewed for an abuse of discretion. *See Wade v. Calderon*, 29 F.3d 1312, 1325-26 (9th Cir. 1994), *overruled on other grounds as recognized by Rohan ex. Rel. Gates v. Woodford*, 334 F.3d 803, 815 (9th Cir. 2003). The scope of an evidentiary hearing is reviewed for an abuse of discretion. *See Cooper v. Brown*, 510 F.3d 870, 877 (9th Cir. 2007); *Williams*, 384 F.3d at 586; *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998).

4. Certificates of Appealability

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") limits the scope of review in a habeas case to those issues specified in the certificate of appealability ("COA"). *See Olvera v.*

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[245] *See also Beaty v. Stewart*, 303 F.3d 975, 993 (9th Cir. 2002); *Karis v. Calderon*, 283 F.3d 1117, 1126-27 & n.1 (9th Cir. 2002); *Laboa v. Calderon*, 224 F.3d 972, 981 n.7 (9th Cir. 2000).

Giurbino, 371 F.3d 569, 572 (9th Cir. 2004); *Hiivala v. Wood*, 195 F.3d 1098, 1102-03 (9th Cir. 1999); *see also Williams v. Rhoades*, 354 F.3d 1101, 1106 (9th Cir. 2004) (reviewing related issue not excluded by the COA). A request to broaden the scope of the COA may be granted if petitioner makes a substantial showing of the denial of a constitutional right. *See Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005); *see also Silva v. Woodford*, 279 F.3d 825, 832 (9th Cir. 2002) (distinguishing standard of review for purposes of granting COA and for granting writ of habeas corpus). Uncertified issues included in a brief are treated as a request to expand the scope of the COA. *See Delgadillo v. Woodford*, 527 F.3d 919, 930 (9th Cir. 2008).

5. Discovery

The court's decision to permit discovery in habeas proceedings is reviewed for an abuse of discretion. *See Cooper v. Brown*, 510 F.3d 870, 877 (9th Cir. 2007); *Bittaker v. Woodford*, 331 F.3d 715, 728 (9th Cir. 2002) (en banc) (noting habeas discovery is limited to court's discretion); *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999) (noting discovery is available only in the discretion of the court).

6. Evidentiary Hearings

The district court's decision whether to conduct an evidentiary hearing for a § 2255 motion is reviewed for an abuse of discretion. *See United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158-59 (9th Cir. 2000).

In pre-AEDPA § 2254 proceedings, a state habeas petitioner is entitled to an evidentiary hearing if she alleged facts that, if proven, would entitle her to relief, and she did not receive a full and fair evidentiary hearing in a state court. *See Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004); *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004); *Beaty v. Stewart*, 303 F.3d 975, 993 (9th Cir. 2002); *Laboa v. Calderon*, 224 F.3d 972, 981 n.7 (9th Cir. 2000).

The court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. *See James v. Ryan*, No. 08-99016, --- F.3d ---, 2012 WL

639292, at *17 (9th Cir. Feb. 29, 2012); *Fairbanks v. Ayers*, 650 F.3d 1243, 1251 (9th Cir. 2011); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008); *Cooper v. Brown*, 510 F.3d 870, 877 (9th Cir. 2007); *Beardslee v. Woodford*, 358 F.3d 560, 573 (9th Cir. 2004). The decision to conduct an evidentiary hearing is also reviewed for an abuse of discretion. *See Lawson v. Borg*, 60 F.3d 608, 611 (9th Cir. 1995). The district court's decision to conduct an evidentiary hearing without petitioner's presence is reviewed for an abuse of discretion. *See Wade v. Calderon*, 29 F.3d 1312, 1325-26 (9th Cir. 1994), *overruled on other grounds as recognized by Rohan ex. Rel. Gates v. Woodford*, 334 F.3d 803, 815 (9th Cir. 2003). The scope of an evidentiary hearing is reviewed for an abuse of discretion. *See Cooper*, 510 F.3d at 877; *Williams*, 384 F.3d at 586; *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998). *See also Phillips v. Ornoski*, 673 F.3d 1168, 1179 (9th Cir. 2012) (pre-AEDPA) (the district court's decision to limit evidentiary hearing to written evidence is reviewed for abuse of discretion).

Note that the AEDPA limits the district court's authority to conduct evidentiary hearings in § 2254 proceedings. *See* 28 U.S.C. § 2254(e)(2); *see also Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1171 n.4 (9th Cir. 2003) (reviewing limitations).[246] If the petitioner failed in state court to develop the factual basis for a claim, no hearing may be held unless the claim relies on (1) a new rule of constitutional law or facts previously undiscoverable and (2) it is clear by "clear and convincing evidence" that but for the claimed error, "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). The district court's interpretation of these standards in determining whether to conduct an evidentiary hearing is reviewed de novo. *See Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). The court's decision to deny an evidentiary hearing based on these standards is reviewed for an abuse of discretion. *See Davis v. Woodford*, 333 F.3d 982, 991 (9th Cir. 2003), *amended by* 384 F.3d 628 (9th Cir. 2004).

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246 *Bragg v. Galza*, 242 F.3d 1082, 1089-90 (9th Cir.) (noting AEDPA precludes remand for an evidentiary hearing), *amended by* 253 F.3d 1150 (9th Cir. 2001); *Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000) (noting AEDPA limits district court's discretion); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999) (noting AEDPA "substantially restricts the district court's discretion to grant an evidentiary hearing").

7. Interstate Agreement on Detainers Act

A petition for habeas relief based on an alleged violation of the Interstate Agreement on Detainers Act ("IAD") is reviewed de novo. *See* *King v. Brown*, 8 F.3d 1403, 1409 (9th Cir. 1993); *Snyder v. Sumner*, 960 F.2d 1448, 1452 (9th Cir. 1992). Note that a court's refusal to dismiss an indictment based on its interpretation of the IAD is reviewed de novo. *See* *United States v. Lualemaga*, 280 F.3d 1260, 1263 (9th Cir. 2002).

8. Juror Misconduct

Allegations of juror misconduct in habeas cases are reviewed de novo. *See* *Caliendo v. Warden*, 365 F.3d 691, 694 (9th Cir. 2004); *Mancuso v. Olivarez*, 292 F.3d 939, 949 (9th Cir. 2002); *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000). The court's decision not to hold a hearing on alleged juror misconduct is reviewed for an abuse of discretion. *Davis v. Woodford*, 333 F.3d 982, 1006 (9th Cir. 2003), *amended by* 384 F.3d 628 (9th Cir. 2004).

9. Reconsideration

The district court's denial of a motion to reconsider is reviewed for an abuse of discretion. *See* *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001); *McDowell v. Calderon*, 197 F.3d 1253, 1256 (9th Cir. 1999) (en banc); *see also* *Ybarra v. McDaniel*, 656 F.3d 984, 998 (9th Cir. 2011).

10. Statutes of Limitations

Dismissals based on statutes of limitations are reviewed de novo. *See* *Bryant v. Ariz. A.G.*, 499 F.3d 1056, 1059 (9th Cir. 2007); *Shannon v. Newland*, 410 F.3d 1083, 1087 n.3 (9th Cir. 2005).[247] Legal determinations regarding equitable tolling are also reviewed de novo. *See Bryant*, 499 F.3d at 1060; *Shannon*, 410 F.3d at 1087 n.3; *Malcom v. Payne*, 281 F.3d 951, 956 (9th Cir. 2002) (§ 2254); *Corjasso v. Ayers*, 278 F.3d 874, 877 (9th Cir. 2002). Note that the district court has the discretion to stay habeas

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[247] *See, e.g.*, *Guillory v. Roe*, 329 F.3d 1015, 1017 (9th Cir. 2003) (§ 2254); *Ferguson v. Palmateer*, 321 F.3d 820, 822 (9th Cir.) (§ 2254); *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002) (§ 2254); *Hasan v. Galaza*, 254 F.3d 1150, 1153 (9th Cir. 2001) (§ 2254).

proceedings pending state action to avoid the limitations period in § 2244(d). *See* *Valerio v. Crawford*, 306 F.3d 742, 771 (9th Cir. 2002) (en banc).

11. Successive Petitions

The AEDPA made significant changes to 28 U.S.C. § 2244, setting requirements for filing a second or successive habeas petition. *See* *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc) (noting limitations); *Rohan v. Woodford*, 334 F.3d 803, 812 (9th Cir. 2003) (noting "strict limits on successive petitions"); *Barapind v. Reno*, 225 F.3d 1100, 1111 (9th Cir. 2000) (noting provision does not apply to § 2241 petitions); *Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 163 F.3d 530, 538 (9th Cir. 1998) (en banc) (discussing AEDPA), *overruled in part on other grounds by* *Woodford v. Garceau*, 538 U.S. 202, 205 (2003). A district court's determination that petitioner failed to establish eligibility under § 2244 to file a successive petition is reviewed de novo. *See* *Woods v. Carey*, 525 F.3d 886, 888 (9th Cir. 2008); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc). A district court's dismissal of a petition under abuse of the writ doctrine is reviewed for an abuse of discretion. *See* *Barapind*, 225 F.3d at 1110.[248]

12. Writ of Ad Testificandum

The trial court's refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify is reviewed for an abuse of discretion. *See* *United States v. Smith*, 924 F.2d 889, 896 (9th Cir. 1991). The court's allocation of costs under a writ of habeas corpus ad testificandum is also reviewed for an abuse of discretion. *See* *Wiggins v. County of Alameda*, 717 F.2d 466, 468 (9th Cir. 1983).

13. Writ of Coram Nobis

The denial of a writ of error coram nobis is reviewed de novo. *See* *United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007); *Matus-Leva v.*

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[248] *See* *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Paradis v. Arave*, 130 F.3d 385, 390 (9th Cir. 1997); *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996).

United States, 287 F.3d 758, 760 (9th Cir. 2002); *United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989).